Office-Supreme Court U.S.
FILED
MAY 3 1962
JOHN DAVIS, CLERK

Supreme Court of the United States

~~9[illegible]~~ 100

No. 62

MILTON J. HARRIS

Appellant,

versus

THE FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida, et al.,

Appellees,

APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

BURTON B. LOEBL
1880 N. E. 170th Street
North Miami Beach, Florida
ROSENHOUSE & ROSENHOUSE
910 Olympia Building
Miami, Florida
D. L. ROSENHOUSE
910 Olympia Building
Miami, Florida
Attorneys for Appellant

M. H. ROSENHOUSE
910 Olympia Building
Miami, Florida
Of Counsel for Appellant

INDEX

	Page
Statement as to Jurisdiction	1-2
The Opinions Below	2-3
Jurisdiction	3-8
Questions Presented	
No. 1 (a,b,c,d,)	9-10
No. 2	10
Statement of the Case	10-18
No. 1 The basis of revoking appellant's Real Estate Broker's License by the Real Estate Commission (an Administrative Body)	10-11
No. 2 Declaratory action for injunction and decree respecting constitutionality of Florida Statutes Sec. 475.25(2) (FSA Vol. 15a)	12
No. 3 The Final Decree of the Circuit Court Holding Section 475.25(2) Fla. Statutes Unconstitutional and Void.	12-13
No. 4 The Direct Appeal of The Florida Real Estate Commission from the Circuit Court's Final Decree to the Supreme Court of Florida (By-Passing the District Court of Appeal of Florida).	13-16

INDEX (cont.)

Page

No. 5 The Real Estate Commission's Notice of Appeal Omitted to Name any Court to Which the Appeal was taken and was violative of the Due Process Clause 16-18

The Federal Questions are Substantial 18-21

Conclusion 21-22

Proof of Service 23

Appendices

Appendix A ..... App. 1-15

Appendix B (majority) ..... App. 15-26
(dissenting) ..... App. 26-28

Appendix C ..... App. 30

TABLE OF AUTHORITIES

CASES: Page

Florida Real Estate Commission vs. Harris (Fla.) 134 So. 2nd 785 2

Anonymous Nos. 6 and 7 v. Baker 79 S ct. 1157 - 360 U.S.287 8

(see particularly Headnote 1 and Text 1159)

Burton v. Wilmington Parking Authority ____U.S. ____ 6 L.ed.2nd 43, 81 S ct ____ (5 L.ed. 2nd 40, 81S ct 52, postponing consideration of jurisdiction) 8

Connally etc. et al., v. General Construction Co. 269 U.S. 385, 46 S ct 126, 70 L.ed 322 20-21

Wolf v. North Carolina 364 U.S. 177 4 L.ed. 1650 80 S ct 1482 8

Yu Cong Eng. et al. v. Trinidad 271 U.S. 500, 46 S ct 619, 70 L. ed. 1058 21

STATUTES:

475.25 (2) Florida Statutes (FSA Vol. 15a) 1, 2, 3, 5, 8, 9, 10, 11, 12, 13, 14, 16, 18

USCA 1257 (2) 4

USCA Title 28, ¶2103 5

RULES:

Rule 2.1a(5)(a) Florida Appellate Rules 14-15

Rule 3.2c Florida Appellate Rules 17

Rule 7.2 (Forms) Florida Appellate Rules 17

Article V, Section 4(2) Constitution of Florida 15

Supreme Court of the United States

No. ———

MILTON J. HARRIS

Appellant,

versus

THE FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida, et al.,

Appellees,

APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

STATEMENT AS TO JURISDICTION

Appellant, MILTON J. HARRIS, submits herewith his statement particularly disclosing the basis upon which this Honorable Court has jurisdiction on appeal to review the bare majority judgment (4 to 3) of the Supreme Court of Florida in Case #31,102, styled (The Florida Real Estate Commission, a Statutory Commission, et al, Appellants vs. Milton J. Harris, Appellee), reversing a final decree of the Circuit Court for Dade County, Florida, Case #59C 11355, declaring Section 475.25 (2) Florida Statutes (1957) unconstitutional under the laws of Florida

and the United States, which reversal judgment also directed the dismissal of the complaint which predicated the Circuit Court's final decree.

Coincident with this constitutional question is an appeal from the Supreme Court of Florida's denial of Appellant's motion for the recalling of the mandate of reversal, and to dismiss the Real Estate Commission's Appeal because their notice of appeal did **not contain** and **entirely omitted** to name **any court** to which the appeal was taken. (Tr. 25). One of the questions presented in the appeal to this Honorable Court is that such omission was fatal to a valid appeal and did not constitute due process.

THE OPINIONS BELOW

The Dade County, Florida, Circuit Court final decree and opinion containing findings of fact and citations of many authorities holding **Section 475.25 (2) Florida Statutes** unconstitutional is found in transcript submitted herewith (Tr. 35 to p. 45).

The Supreme Court of Florida bare majority reversal opinion (4 to 3) with directions to dismiss the complaint is found in **134 Southern** 2nd page 785-789. The dissenting opinion of Mr. Justice Thomas concurred in by Mr. Justice Terrell and Mr. Justice Hobson is found on pages 790-791 of **134 Southern** 2nd.

The denial of the motion to recall reversal opinion and mandate and to dismiss the Real Estate's Commission appeal is not reported but found in Tr. Page 81.

Copies of the Circuit Court's opinion, the Supreme Court of Florida majority and dissenting opinions and the order denying motion to recall and dismiss appeal are attached hereto as Appendix A, Appendix B, and Appendix C respectively.

JURISDICTION

1. This is an appeal from two decisions of the Supreme Court of Florida, as follows:

(a) The reversal by a bare majority (4-3) of a final decree in Chancery, of the Circuit Court of Dade County, Florida, which held unconstitutional and void Sec. 475.25 (2) of the Florida's Real Estate Brokers' Act, and enjoined the carrying out of the revocation of Appellant's Real Estate Broker's License by the Appellee, The Florida Real Estate Commission, which followed the mandatory provisions of said section requiring revocation of a broker's license **if holder is confined in any state or Federal Prison** ********: The reversal opinion and mandate also ordered the dismissal of the complaint upon which the final decree was predicated.

(b) Denial of Appellant's motion to recall the mandate of reversal and to dismiss the Florida Real Estate Commission appeal because the Notice of Appeal did not contain, but entirely omitted to name any court to which the appeal was taken, which is contended is not due process.

2. As to the reversal of the Final Decree of the Circuit Court, the Supreme Court of Florida handed down it's bare majority opinion and dissenting opinion

Oct. 25, 1961 (Tr. 50-60) dissenting opinion (Tr. 61-63). Appellant's petition for rehearing (Tr. 64) was denied Dec. 11, 1961. Notice of appeal to this Court was filed March 5, 1962, with the Clerk of the Supreme Court of Florida. (Tr. 91).

As to the order denying Appellant's petition to recall reversal mandate and to dismiss the Florida Real Estate Commission's appeal, the petition was filed with the Supreme Court of Florida Jan. 26, 1962 (Tr. 77-80) and denied Feb. 6, 1962. The notice of appeal to this Court was filed with the Supreme Court of Florida on March 5, 1962. (Tr. 86-91).

3. The jurisdiction of this court upon appeal is conferred by USCA #1257 (2).

Appellant herein (the appellee in the Florida Supreme Court) successfully challenged in the Circuit Court of Dade County, Florida, the constitutionality of the mandatory requirement of the real estate brokers' Act to revoke his real estate license by the Florida Real Estate Commission because of being confined for 113 days in a Federal Detention Prison, and the Circuit Court enjoined the Real Estate Commission from carrying out such revocation.

On the Real Estate Commission's direct appeal to the Supreme Court of Florida (allowed by the Constitution of Florida) and thereby by-passing an appeal to the District Court of Appeal, the Supreme Court of Florida by bare majority opinion (4 to 3) reversed the Final Decree of the Circuit Court, and directed the dismissal of the complaint (avoiding the constitutional question,

which they had jurisdiction of and which was directly involved) basing their reversal and dismissal of the complaint on a res judicata question.

If however this court feels that a direct appeal to this court is not applicable, then it is suggested that important constitutional questions are involved and presented, and the appeal papers **should** be treated as a petition for writ of Certiorari under **Title 28**, Paragraph 2103 USCA.

It is significant to note that the opinion of reversal of the Circuit Court's Final Decree holding the statute attacked unconstitutional, was by a divided court (4 to 3). The dissenting opinion concurred in by two other Justices, written by Mr. Justice Thomas, stated that the jurisdiction of the Supreme Court of Florida was invoked by direct appeal from the Circuit Court because it held unconstitutional a state statute, and having been invoked by appeal, the failure to pass on the constitutionality was not properly predicated.

In the Circuit Court's Final Decree there was drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution and Laws of the United States and the Circuit Court's decision was against its validity, and when the Supreme Court of Florida reversed the decree, it in effect, favored the validity of the statute **Section 427.25 (2) Florida Statutes.**

Under the laws of Florida the reversal of the Circuit Court's decree for any reason was a finality so far as the constitutionality of the statute was concerned. No other proceedings could be taken in the State Court, nor

would a lower court have any jurisdiction under the court's reversal order because the Supreme Court of Florida (the highest state court) reversed the Final Decree of the Circuit Court and directed dismissal of the complaint.

Also applicable to the Notice of Appeal because of the omission to set out the name of any court to which the appeal was taken by the Real Estate Commission which the Supreme Court of Florida denied and refused to recall the mandate of reversal and to dismiss the appeal, which order the appellant contends is a denial of the due process because a Notice of Appeal **without naming any court to which** the appeal is taken, is a nullity, and **a failure to accord due process.**

A state court may not avoid deciding Federal questions, and thus defeat the jurisdiction of the United States Supreme Court by putting forward non-federal grounds of decision which are without any fair or substantial support. The Federal constitutional question was properly before the Supreme Court of Florida for decision which they avoided, and under the decisions of this court, we believe that this court should ascertain whether the non-constitutional grounds relied upon to reverse the judgment of the Circuit Court independently and adequately support the judgment of reversal of the Supreme Court of Florida.

The three dissenting judges of the Supreme Court of Florida, speaking through Mr. Justice Thomas in his dissenting opinion stated:

"The opinion (referring to the bare majority

reversal opinion) begins with the statement that the appeal has come direct to this court under the provisions of **Sec. 4 (2), Art. V of the Constitution** and **Rule 2.1a (5) (a), Florida Appellate Rules**, that such an appeal may be taken to this court "as a matter of right" from a judgment or decree directly determining the validity of a state statute."

"The opinion ends with the declaration that because of the attitude toward other features of the litigation the court is precluded 'from passing upon the validity of the questioned statute.' With such a position I cannot agree."

"There can be no doubt from the simple wording of the constitutional guaranty that a right of appeal to this court vests in a litigant the moment a judgment or decree is entered judging the validity or invalidity of a state statute. My concern is with the duty of this court once the case arrives here. It seems to me inconsistent to recognize the appeal from such a judgment or a decree as a vehicle to bring into play the power of this court to review and then to discard the basic question as unnecessary of decision and adjudicate other issues which, without the basic question would be matters for decision by District Courts of Appeal." (supplied)

4. Cases believed to sustain the jurisdiction of this court upon appeal include:

Anonymous Nos. 6 and 7 v. Baker 79 S. C. 1157 — 360 U.S. 287

(See particularly Headnote 1 and Text 1159)

Wolf v. North Carolina 364 U.S. 177 4 L. ed. 1650 80 S.Ct. 1482

Burton v. Wilmington Parking Authority ____ U.S. ____ 6 L. ed. 2nd 43, 81 C.Ct. ____ (5 L. ed. 2nd 40, 81 S.Ct. 52, postponing consideration of jurisdiction).

5. The portion of the Florida Real Estate Brokers' Law, which the Circuit Court of Dade County, Florida, held unconstitutional and void, and which ruling and final judgment was reversed by the Supreme Court of Florida, is **Section 475.25 (2) of Florida Statutes** (FSA Volume 15a) and is as follows:

> "(2) The registration of a registrant **shall be revoked,** if such registration, or a certificate issued thereon, is found to have been obtained by the registrant by means of fraud, misrepresentation or concealment, or if the **registrant has become** a non-resident of the **State of Florida, or is confined in any state or federal prison,** or **insane asylum, or through mental disease** or deterioration, the registrant can no longer safely be entrusted to deal with the public or in a confidential capacity; and a registration or a certificate may be revoked or cancelled, without prejudice to filing a proper application, or request for certificate, if the same shall have

been granted or issued through the mistake or inadvertence of commission." (supplied)

QUESTIONS PRESENTED

1. Whether the provision of the Real Estate Brokers' Laws of Florida mandatorially requiring the Florida Real Estate Commission (an administrative body) to revoke a real estate broker's license **(Sec. 475.25 (2) Florida Statutes)** (FSA Vol. 15a) for **mere confinement** in a **state or federal prison**, under which the Commission revoked and sought to enforce the revocation of Appellant's license as a real estate broker, is violative of the constitutional provisions of the United States, in that

(a) It is discriminatory and a denial of equal protection and treatment under the law. (No such mandatory penalty requirement applies to any other regulated profession).

(b) **Florida Statutes Section 475.25 (2)** fails to invoke on an administrative body adequate standards, clearly defined and expressly set forth and does not afford due process.

(c) The word "confined" as used in the statute fails to set up reasonably well-defined standards to the extent that the delegation of authority sought to be vested in the administrative body (appellees in this cause) so that it would be readily determinative of the intent of the term "confined", as to methed of "confinement" or the reason for "confinement" or the

length of "confinement" or "confinement" only after and as a result of conviction.

(d) A statute of penal nature which subscribes no ascertainable standard of guilt and delegates the determination of such standard to be supplied by others, constitutes an unconstitutional delegation of legislative power.

(e) **Section 475.25 (2) Florida Statutes** is clearly without standards, criteria and definite detail and gives the administrative body the opportunity to do irreparable damage to individuals contrary to the constitutional guarantees.

2. Whether a notice of appeal, which entirely omitted to name any court (appellate or otherwise) to which the appeal is taken, is a void appeal, and conferred no jurisdiction to hear the appeal, and was violative of the due process clause of the Constitution of the United States.

STATEMENT OF THE CASE

1. The basis of revoking appellant's Real Estate Brokers License by the Real Estate Commission (an administrative body)

Appellant, MILTON J. HARRIS, a duly licensed real estate broker in Miami Beach, Florida, under the laws of Florida, since 1946, with an unblemished record so far as any complaint against him with the Florida Real Estate Commission was concerned, on the 18th day of June, 1958, suffered a final order of the Florida Real Estate Com-

mission, which revoked his license as a real estate broker under the mandatory provision of **Sub-Sec. 475.25 (2) Florida Statutes** (FSA Vol. 15a), which sub-section provided for the mandatory revocation of license by the administrative body, The Florida Real Estate Commission, "if the registrant **** is confined in any state or federal prison."

The order of revocation (Tr. 32) set out that the appellant on the 20th day of April, 1956, was convicted for income tax evasion by the United States of America, and sentenced to a period of six months and fined, and was directed to surrender to the office of the United States Marshal, Tallahassee, Florida, on or before noon on the 17th day of January, 1958, to commence the sentence imposed upon him, to which order the (defendant) appellant did so surrender and he was confined in the Federal Correction Institution at Tallahassee, Florida, the revocation order stating "and that by reason thereof, revocation of defendant's registration as a registered real estate broker is mandatory under the provision under **Florida Statutes Sec. 275.25 (2)** (Vol. 15a FSA)".

Although appellant was sentenced to a six months' term, he was released after 113 days because of the inconsequential nature of the offense, nevertheless he paid his debt and obligation to society therefor by serving the term above set forth.

The reason for his confinement in the federal prison was wholly unconnected with any phase of his brokerage business or his functions as a registered and licensed real estate broker.

2. Declaratory action for injunction and decree respecting constitutionality of Florida Statutes Sec. 475.25 (2) (FSA Vol. 15a)

After legal skirmishing in other courts, the appellant filed a sworn complaint for injunction against the appellees in the Circuit Court in and for Dade County, Florida, on the Chancery side, Case No. 59C 11355 J, on November 30, 1959 (Tr. 3 to 13). This action sought the enjoining and restraining of the appellee, The Florida Real Estate Commission, from enforcing its arbitrary, unreasonable and unconstitutional interpretation of **Florida Statute 475.25 (2)** and enforcing appellant's retention of his real estate registration certificate, and his operation as a licensed real estate broker in the State of Florida, and also sought a declaratory decree that Section 2 of the Statutes as aforesaid, be established as arbitrary, unreasonable and unconstitutional.

The Chancellor entered a temporary injunction in accordance with the prayer of the sworn complaint on the 30th day of November, 1959. The appellees here (the defendants in the court below) were duly served, filed a motion to dissolve the injunction and other pleadings, as well as an answer to the allegations of the complaint, in which answer the appellees conceded that the appellants' registration was revoked under the mandatory provisions of Sub-Sec 2 of the **Florida Statutes 475.25.**

3. The final decree of the Circuit Court holding Section 475.25 (2) Florida Statutes unconstitutional and void.

On July 11, 1960, the Chancellor Hon. George E. Holt

entered a Final Decree in the Circuit Court suit finding Sub-Section 2 of the **Florida Statutes 475.25**, unreasonable, unconstitutional, void and invalid, setting out that to permit the revocation of appellant's broker's license, would be to deny him the constitutional right of the equal treatment under the law, and contrary to constitutional guarantee of equal protection of the law in accordance with Section 1 of the Declaration of Rights of the Florida Constitution, and would do violence to the guarantees granted under Article XIV of the Constitution of the United States.

The Final Decree holding the challenged Sub-Section unconstitutional was ten pages in length (Tr. page 35 to 45) and is set out in full in Appendix "A" hereto attached.

This Final Decree contains findings of facts, many state and federal decisions upon which the Chancellor based his decree and set forth that no statute dealing with the policing, licensing and regulating of the members of professions (setting out sixteen in number) except the real estate statute has a **mandatory** revocation penalty for confinement, but on the contrary, they provide discretionary penalties of either suspension or revocation or no penalty at all. In order not to elongate this jurisdictional statement, the Court is respectively referred to this erudite decree as though it was fully set out here, in support of this appellant's contentions.

4. The direct appeal of the Florida Real Estate Commission from the Circuit Court's final decree to the Supreme Court of Florida (by-passing the District Court of Appeal of Florida).

Pursuant to the provisions of **Article V, Section 4 (2)a** Constitution of the State of Florida, and **Rule 2.1a (5) (a)** Florida Appellate Rules, the Florida Real Estate Commission, as appellants, filed its appeal from the final decree of the Circuit Court as aforesaid, which held Sub-Section 2 of **475.25 FSA** unconstitutional, **direct** to the Supreme Court of the State of Florida, (by-passing the inferior Appellate Court, the District Court of Appeal). Such a direct appeal is jurisdictional, and for the convenience of this Court **Rule 2.1a (5) a** is set out and is as follows:

"(5) JURISDICTION OF THE SUPREME COURT

(a) Appeals **from trial courts may be** taken **directly to the Supreme Court, as a matter of right, only from judgments** imposing the death penalty, **from final judgments or decrees passing** directly **upon the validity of a state statute or a federal statute** or treaty, or **construing a controlling provision of the Florida** or Federal Constitution, and from final judgments or decrees in procedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review interlocutory orders or decrees passing upon chancery matters which upon final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory appeals, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the case on review." (emphasis supplied)

The Supreme Court of Florida in its opinion (bare majority, 4 to 3) (Tr. 50 to 60, Appendix "B" attached hereto) by Mr. Justice Drew, speaking for the bare majority, stated:

> "This appeal comes directly to this court pursuant to **Article V, Section 4.2a Constitution State of Florida** and **Rule 2.1a (5) (a) Florida Appellate Rules**", yet by-passed and did not decide the constitutional question presented by the appeal and the record, but reversed the final decree on non-constitutional grounds (res judicata).

The dissenting opinion of the three Justices of the Supreme Court of Florida, speaking through Mr. Justice Thomas (Tr. 61 to 63, Appendix "B") in part stated:

> "There can be no doubt from the simple wording of the constitutional guaranty **that a right of appeal to this court** vests in a litigant **the moment a judgment or decree** is entered judging the validity **or invalidity of a state statute.** My concern is with the **duty of this court once the case arrives** here. It seems to me inconsistent to **recognize the appeal from such a judgment** or decree as a vehicle **to bring into play the power of this court** to review and then to **discard the basic question** as unnecessary of decision and **adjudicate other issues which,** without the basic question would **be matters for decision by District** Courts of Appeal."

It is therefore contended by the Appellant here that

the avoiding by the Supreme Court of Florida of deciding the constitutional questions presented by the direct appeal from the Circuit Court to the Supreme Court of Florida, and thus defeat the jurisdiction of the United States Supreme Court, by putting forward non-federal grounds of decision which is without any fair or substantial support, that this court should ascertain whether the non-constitutional grounds relied upon to reverse the judgment of the Circuit Court independently and adequately support the judgment of reversal of the Supreme Court of Florida.

It is earnestly contended by the appellant here that the reversal by the Supreme Court of Florida is not warranted because the **Sub-Section 2 of 475.25 Fla. Statutes** is unconstitutional as proclaimed by the Circuit Court's final decree, and that the reversal by the Supreme Court of Florida of the Circuit Court's holding that the said Sub-Section was unconstitutional, was grave error.

5. The Real Estate Commission's Notice of Appeal Omitted to name any Court to which the appeal was taken and was violative of the due process clause.

At or about the time the Supreme Court of Florida denied appellee's (appellant here) petition for rehearing of reversal opinion of the Circuit Court's Final Decree holding the statute unconstitutional, Mr. Harris' counsel of record on the appeal from the Circuit Court suddenly departed this life, and present counsel was employed in a contemplated appeal to the Supreme Court of the United States, and presentation of petition for a stay, in the interim.

While present counsel was in Tallahassee, Florida, presenting the motion for a stay (which was granted by the Supreme Court of Florida on January 9, 1962) (Tr. 75), he had occasion to inspect the file of the Real Estate Commission on the appeal of the Supreme Court of Florida, at Tallahassee, Florida, and then ascertained that the Notice of Appeal (Tr. 25) did not contain, and entirely omitted to name any court to which the appeal was taken, and did not comply with the **Florida Appellates Rule 3.2C** for taking an appeal which mandatorially requires the setting out of "the title of the court to which the appeal is taken".

For the convenience of this court **Sub-Section C of Florida Appellate Rule 3.2** is as follows:

> "c. CONTENTS OF NOTICE. The notice **of appeal** may be in the form approved by the Court. The notice of **appeal** shall state the **title of the court,** and the style of the cause from which the appeal is taken and the **title of the court to which the appeal** is taken; the name and designation of the appealing party, whether plaintiff or defendant; the name and designation of the opposing party, whether plaintiff or defendant; **the nature,** and date of rendition of the **order, judgment or decree** appealed from; and the date and book and page of the public record in which it is recorded." (emphasis supplied).

It is to be noted that the form approved by the Supreme Court, being **Rule 7.2 of Florida Appellate Rules**

(forms) provides for the name of a definite court to which the appeal is taken.

Consequently, present counsel, feeling that the Supreme Court of Florida never had jurisdiction of the appeal because of the omission to name in the notice of appeal any Appellate Court, or any court for that matter, to which the appeal was taken, filed in the Supreme Court of Florida on behalf of the appellant herein, his motion to recall the mandate, and to dismiss Fla: Real Estate's Commission appeal because the purported Notice of Appeal was insufficient to give the Supreme Court of Florida jurisdiction (Tr. 77 to 79).

Despite the fact that there was no denial that the Notice of Appeal did not conform to the rule, nevertheless the Supreme Court of Florida denied the motion on February 6, 1962. (Tr. 81).

The appellant herein contends that the omission to name an Appellate Court in the Notice of Appeal is violative of the due process clause of the United States, and that it gave no jurisdiction to any Court to hear and determine an appeal.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. The mandatory provision of **Section 475.25 (2) of Florida Statutes**, for revocation of a real estate broker's license for mere **confinement** in a state or federal prison clearly violates constitutional provisions of the United States. Appellant believes that a simple illustration applicable to the case at bar, is sufficient to absolutely predicate that the section of the statute above re-

ferred to, is discriminatory and denial of equal protection and treatment under the law. It fails to invoke on an administrative body adequate standards clearly defined, and does not afford due process and grants unconstitutional delegation of legislative power because no ascertainable standard of guilt and delegates the determination of such standard to be supplied by the administrative body and contrary to the constitutional guarantees.

To illustrate: If after being found guilty of the evasion of income tax, the court had

(a) fined him only, and the fine was paid, the mandatory provisions of revocation statute would not come into play—because Harris was not "confined";

(b) If Harris, the appellant, was fined and took a pauper's oath, he would then only have to serve thirty days—his broker's license, under the mandatory provisions of the statute, would have to be revoked by the Real Estate Commission—because he was "confined".

(c) If the court put him on probation at the time of his sentence, and he avoided confinement after conviction—his broker's license could not be revoked under the mandatory provisions of the attacked statute.

(d) If the court sentenced him to an imprisonment term and suspended the incarceration during good behavior—his broker's license under

the mandatory provision for revocation could not be revoked.

It is therefore earnestly contended that the above illustration shows, we think beyond the peradventure of a doubt, that under the same conviction—depending upon the type of sentence and judgment—the mandatory provision for revocation could, or could not apply, and therefore the statute is unconstitutional for the reasons set forth. The gravamen of the statute for mandatory revocation is the "confinement", and not the predicate for the "confinement".

Under the mandatory provisions of the broker's Act, if a man was charged with crime and unable to give bond for appearance at the trial, and was thus confined in a federal or state prison, although not convicted, the mandatory provisions for revocation of his license would come into play.

The Final Decree of the Circuit Court, Appendix "A", holding unconstitutional the statute is full and complete. The Court not only set out its findings of fact, but predicated its opinion of the unconstitutionality of the statute on many, many cases, both state and federal, and if we were at this point to set the detailed opinion and judgment of the Circuit Court as our argument here, and the citations of the authorities therein contained to show that the federal questions are substantial, we would unduly elongate this jurisdictional statement, and therefore, we ask the Court to take into consideration the citation of authorities set out in the final decree.

In **Connally etc. et al. v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322,** the Court said:

"If the enactment is so uncertain that the court is unable to determine, with any reasonable degree of certainty, what the legislature intended, or it is so incomplete that it cannot be executed, there is no other course open but to condemn it as void for uncertainty."

In the case of **Yu Cong Eng** et al., v. Trinidad, 271 U.S. 500, 46 S. Ct. 619, 70 L. Ed. 1059, the court held:

"The court cannot, in order to bring a statute within the fundamental law, amend it by construction."

"A statute which requires the doing of an act so indefinitely described, that men must guess at its meaning violates due process of law."

"A statute cannot in order to make it conform to constitutional requirements, be given an indefinite mandatory construction in lieu of the broadly prohibitory meaning indicated by its language."

CONCLUSION

Appellant respectfully suggests that the appeals from the two orders (1) from the Supreme Court of Florida's reversal of the Circuit Court's Final Decree holding the statute unconstitutional; and (2) from the Supreme Court of Florida's order denying appellant's petition to recall the mandate and dismissing the appeal because the Notice of Appeal did not contain the name of any Appellate Court, brings before this Court federal questions under the Constitution that are far reaching and important, both in terms of legal principles, and constitutional provisions

that a mandatory statute providing for revocation of a broker's license for mere **confinement** violates the due process laws and the equal protection clause of the United States Constitution, and that enough has been said to demonstrate that the Questions presented show that the Constitutional provisions have not been complied with, and that the Questions are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

ROSENHOUSE & ROSENHOUSE
910 Olympia Building
Miami, Florida

By _____
D. L. Rosenhouse

By _____
M. H. Rosenhouse
-AND-
BURTON B. LOEBL
1880 N. E. 170th Street
North Miami Beach, Florida

By _____
Attorneys for Appellant

M. H. Rosenhouse of Counsel
for Appellant
910 Olympia Building
Miami, Florida,

PROOF OF SERVICE

I, M. H. Rosenhouse, of counsel for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1962, I served four copies of the foregoing Jurisdictional statement, together with the Appendices, by mailing said copies in a duly addressed envelope, with sufficient United States airmail postage prepaid to: Richard W. Ervin, Attorney General, Capitol Building, Tallahassee, Florida; and Benjamin T. Shuman, General Counsel, Florida Real Estate Commission, State of Florida Office Building, West Morse Boulevard, Winter Park, Florida; and depositing same in a United States post office or mail box at Miami, Florida.

_____

M. H. Rosenhouse
Of Counsel for Appellant

I hereby acknowledge receipt of four copies of the foregoing Jurisdictional Statement on this the _____ day of _____, 1962.

RICHARD W. ERVIN
Attorney General
State of Florida

By _____
Assistant Attorney General
Attorney for Appellee,
Capitol Building, Tallahassee, Florida

I hereby acknowledge receipt of four copies of the foregoing Jurisdictional Statement on this the_____ day of_____, 1962.

BENJAMIN T. SHUMAN,
General Counsel
Florida Real Estate Commission
State of Florida Office Building
West Morse Boulevard
Winter Park, Florida

By _____
BENJAMIN T. SHUMAN

APPENDIX A

(Final Decree of Circuit Court Holding Fla. Statute 475.25. (2) unconstitutional)

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA. — IN CHANCERY — NO. 59C 11355.

MILTON J. HARRIS,

Plaintiff,

vs.

THE FLORIDA REAL ESTATE COMMISSION,

A Statutory Commission under the laws of the State of Florida; and ROBERT T. BRINKLEY, Chairman;

JAMES T. BORING, Vice-Chairman, and SYLVAN M. MAXWELL, Commissioner, as and Constituting the Members of Said Commission,

Defendants.

FINAL DECREE

Oral Argument having been heard as presented by the attorneys for the litigants, and due consideration having been given to the Memorandums of Law submitted by the attorneys for the Plaintiff and the Defendants, in accordance with Stipulation of the attorneys for the parties, that an opportunity be given for the submitting of said Memorandums of Law, it is the opinion and conclusion of the court that:

The challenged Sub-Section (2) of Florida Statute 475.25 is unconstitutional and invalid, and shall not apply to the position and cause of the Plaintiff.

As a court of competent jurisdiction, I must in this cause, since organic rights are shown to be violated by the action of an administrative body by violence to or conflict with express and fairly implied limitations of both the State and Federal Constitutions, prevent the consequence that would result and the irreparable harm and injury it would impose upon the Plaintiff in this cause.

The Courts have consistently held that "in justiciable cases in which organic rights are shown to be violated, courts of competent jurisdiction should adjudicate that, in the process of its enactment, or in its provisions or intendments or in its operation or effect, a legislative act conflicts with an express or fairly implied limitation of either the State or Federal Constitution, and that as a consequence the enactment is inoperative either in whole or in part or as applied to the particular case."

Douglas V. Webber, (1930) 99 Fla 755, 128 So 613.

State Ex rel. Atty. Gen. V. Avon Park (1933) 108 Fla 641, 149 So 409.

Amos V. Mathews (1930) 99 Fla 1, 126 So 308.

This Court in the within case has no other alternative except to protect and defend the Plaintiff and the constitutional intent of that force of guarantee which the Defendants would violate.

"The judicial power extends only to an enforcement of the Constitution when its protection is properly involved in a judicial manner before a competent tribunal by one entitled to claim the benefit of the Constitution's provision against some threatened wrong to be done in disregard of organic inhibition or mandate." **State Ex rel.**

Crim v. Juvenal (1935)118 Fla 487, 159 So 663.

Brown V. Lakeland (1911) 61 Fla 508, 54 So 716.

This court in the appropriate discharge of its duty follows the affirmative responsibility that there rests upon the courts the duty of refusing to sustain that which by the Constitution is known to be or has been declared repugnant to public policy and of supporting, protecting and defending the Constitution by giving effect to the provisions of the Constitution even if in so doing a statute is held to be inoperative.

"A plain abuse of legislative prerogative may be stricken down by the courts even though no specific item, sentence, or clause of the Constitution was in express terms shown to have been violated by the legislation thus declared void." **State ex rel. McMullen v. Johnson** (1931) 102 Fla 19, 135 So 816.

State Ex Rel Nuveen v. Greer (1924) 88 Fla 249, 102 So 739, 37 ALR 1298.

Douglas v. Webber, supra.

Local 234, U.A.J.A. v. Henley & Beckwith, Inc. (1953 Fla) 66 So (2) 818.

State ex rel. West v. Butler (1914) 70 Fla 102, 69 So 771.

Ex parte Messer (1924) 87 Fla 92, 99 So 330.

State ex rel Davis v. Largo (1933) 110 Fla 21, 149 So 420.

"Upon a finding that a statute is so unwarranted as to be violative of both the letter and the spirit of the Constitution, it becomes the solemn duty of the court to declare such an act unconstitutional and void."

State ex rel Davis v. Largo (1933) 110 Fla 21, 149 So 420.

Escambia County v. Pilot Comrs. (1906) 52 Fla 197, 42 So 697, 120 Am St Rep 196.

Seaboard Air Line R. Co. v. Simon (1908) 56 Fla 545, 47 So 1001, 20 LRA NS 126, 16 Ann Cas 1234.

Brown v. Lakeland, supra.

Jacksonville v. Bowden (1914) 67 Fla 181, 64 So 769, LRA1916D 913, Ann Cas 1915D 99.

State ex rel Clarkson v. Philips (1915) 70 Fla 340, 70 So 367, Ann Cas 1918A 138.

State ex rel. Young v. Duval County (1918) 76 Fla 180, 79 So 692,

State ex rel Nuveen v. Greer, supra.

Gray v. Central Florida Lumber Co. (1932) 104 Fla 446, LS So 320, 141 So 604, cert den 287 US 634, 77 L ed 549, 53 S Ct 84.

State ex rel Payson v. Chillingworth (1936) 122 Fla 339, 165 So 264.

Ex parte White (1938) 131 Fla 83, 178 So 876.

Miami Beach v. Lachman (1953 Fla) 71 So(2) 148, app dismd 348 US 906, 99 L ed 711, 75 S Ct 292.

Thursby v. Stewart (1931) 103 Fla 990, 138 So 742.

"However much the court may deplore any real or imaginary unfortunate conditions which may arise by a determination of a question of constitutionality squarely presented, the court cannot evade the duty it owes to every citizen to protect him against invasion of his constitutional rights." **State ex rel. Davis v. Largo** (1933) 110 Fla 21, 149 So 420, on rehearing.

Acknowledging the power and responsibility of devising remedies for public evils, as belonging to the legislative (and therefore, its creatures, administrative bodies, as is the Florida Real Estate Commission, in this instance),

rather than to the Judicial Department, and normally our courts deferred to the judgment of the Legislature in the exercise of the police power, it is my conviction that the courts have the power and the duty to determine whether the exercise of the police power is within constitutional limits as determined and repeatedly affirmed by our Supreme Court. See:

State ex rel. Church v. Yeats (1917) 74 Fla 509, 77 So 262.

Mayo V. Florida Grapefruit Growers' Protective Assoc. (1933) 112 Fla 117, 151 So 25.

Varholy v. Sweat (1943) 153 Fla 571, 15 So 2nd 267 Liquor Store, Inc. V. Continental Distilling Corp. (1949) Fla, 40 So(2) 371.

"Although the question of whether police regulations are proper and necessary is primarily for legislative decision, it is for the court to determine whether such regulations are just and reasonable so as to be in harmony with constitutional guarantees."

State ex rel Davis v. Rose (1929) 97 Fla 710, 122 So 225.

The role of the courts is that of the final judge as to what are proper subjects of the police power, and the lawmaking authority; the legislature can not arbitrarily make that a subject of its exercise, which from its nature is not one.

This is in line with the doctrine adopted by our highest court in 1890 from which they have never receded. See:

Jacksonville v. Ledwith (1890) 26 Fla 163, 7 So 885, 9 LRA 69, 23 Am St Rep 558.

States ex rel Fulton v. Ives (1936) 123 Fla 401, 167 So 394.

We have held fast to the above doctrine and continuously re-emphasized it as expressed in: **Publix Cleaners v. Florida Dry Cleaning & Laundry Bd. (1940) 32 F Supp 31**, in which it was concluded:

"The determination of whether regulatory measures are desirable or adequate to curb evil aimed at is a legislative power, but the responsibility remains immune from judicial interference for **only so long as constitutional guarantees are preserved and not invaded**, and **arbitrariness and capriciousness avoided.**" (emphasis supplied)

The degree of completeness, the definitive details, the criteria and standards which set the framework within which an administrative body must operate, is the most essential ingredient which must be presented in an act adopted by the Legislature, in order that the conferring of authority or delegation of power to an administrative body or board be lawful

There is an essential difference between "an invalid delegation of legislative power" and "the delegation of invalid power by the legislature." In a measure, we have this to deal with in the instant case.

Because the Legislature failed to pass on to the administrative body, in this instance, the Florida Real Estate Commission, a law so complete in all of its terms, and provisions, including the setting of standards as a criteria, fully defined and spelled out, when it was enacted by the Legislative branch of government, the Sub-Section (2) of Florida Statute 475.25 became and is an act on the part of the Legislature of a "delegation of invalid power to an administrative body."

For clearly without standards, criteria and definitive detail, there exists and is present, as in the instant case, the opportunity to do ireparable damage to individuals, contrary to constitutional guarantees. See:

State V. Atlantic Coast Line R. Co. (1908) 56 Fla 617, 47 So 969, 32 LRA NS 639.

Spencer v. Hunt (1933) 109 Fla 248, 147 So 282.

Robbins V. Webb's Cut-Rate Drug Co. (1943) 153 Fla 822; 16 So (2) 121.

Petition of Florida State Bar Assn. (1945) 155 Fla 710, 21 So (2) 605, 158 ALR 699.

Ex Parte Lewis (1931) 101 Fla 624, 135 So 147.

Bailey v. Van Pelt (1919) 78 Fla 337, 82 So 789.

State ex rel. Davis v. Fowler (1927) 94 Fla 752, 114 So 435.

State ex rel. Palm Beach Jockey Club v. Florida State Racing Comm. (1946) 158 Fla 335, 28 So(2) 330.

State v. Florida Turnpike Authority (1955, Fla.) 80 So (2) 337.

"A Statute of a penal nature which prescribes no ascertainable standard of guilt and delegates the determination of such standard to be supplied by others constitutes an unconstitutional delegation of legislative power."

Locklin v. Pridgeon (1947) 158 Fla 737, 30 So(2) 102.

Because the word "confined" is inadequate, in itself, to constitute a set of complete terms and provisions, and standards, for the administrative body to adhere to and be guided by, it is both inadequate and incompetent as a criteria to form the basis for the revocation mandatorily of the Plaintiff's license.

It is besides the point that the Plaintiff in this cause was actually "confined". It is important to note, particularly, that such "confinement", however, was in another court, for another cause, and for a matter unrelated to the professional activities dealt with in the Florida Statute involved in this cause, Florida Statute 475.

To permit this to come about at the hands of the administrative body, the Florida Real Estate Commission, would constitute a failure of this court to recognize the obvious delegation of invalid power by the Legislature

to this Administrative Body, pointing up the clear-cut constitutional inconsistency.

This court recognizing this laxness and inexactness of delegated authority and the unconstitutional element of authority illegally delegated must proceed to strike this Sub-Section (2) of Florida Statute 475.25 as being unreasonable and unconstitutional and therefore illegal.

This court, of necessity, must adopt the philosophical jurisprudence expounded by the Plaintiff in his Memorandum of Law and restate that it clearly could not have been the intent of the Legislature to make **mere** "confinement" the grounds for mandatory revocation of the license of a professional person against whom no prior complaint or charges had ever been filed by any member of the public, or any member of the administrative board, or employee-investigator thereof, for any actual or alleged wrong-doing or misconduct in connection with that area of authority with which the Defendants, the Florida Real Estate Commission; are empowered by the act to police.

The language of the particular Sub-Section (2) of Florida Statute 475.25, here under attack, compelling mandatorily that the administrative body, defendants in this cause, revoke the license of the Plaintiff and others similarly situated, is clearly unconstitutional for failure to invoke upon an administrative body adequate standards, clearly defined and expressly set forth.

Thus, thereby authorizing, because of the loose language of the act, any arrest or holding of a person in a State or Federal prison or any detention area used as an extension thereof, is sufficient, as a matter of fact, is

mandatorily required, that such person, arrested or held, have his or her license revoked and professional standing placed in jeopardy.

The word "confined" as used in the Statute, clearly pronounces the Legislature's failure to set forth a clearly defined outline of standards or criteria in the Statute as to when and under what circumstances "confined" shall apply sufficiently to impose mandatory revocation of a professional license.

The word "confined" as used in the Statute fails to set up reasonable well-defined standards to the extent that the delegation of authority sought to be vested in the administrative body, defendants in this cause, so that it would be readily determinative of the intent of the term "confined", as to method of "confinement"; or, the nature or reason for "confinement"; or, the length of "confinement"; or, "confinement" **only after and as the result of conviction.**

Drexel v. City of Miami Beach, 64 S(2) 317 (1953 Fla)

Phillips Petroleum Co v. Anderson 74 So(2) 544 (1954 Fla)

Robbins v. Webb's Cut Rate Drug Co. 153 Fla 822, 16 So(2) 121 (1943)

State v. Christiansen 142 Fla 537, 195 So 153 (1940).

The Court adopts as its finding of fact additionally

the following. No statute dealing with the policing, licensing and regulating of the members of the professions, except the Real Estate Statute, has a **mandatory revocation** penalty for confinement, but on the contrary, they provide discretionary penalties of either suspension or revocation or no penalty at all. Reference is made below to most of the important professions for which statutes are provided in the State of Florida:

Security Brokers, F.S. 517
Physicians, F.S. 458
Chiropractors, F.S. 460
Certified Public Accountants, F.S. 473
Osteopaths, F.S. 459
Chiropodists, F.S. 461
Naturopaths, F.S. 463
Optometrists, F.S. 463
Nurses, F.S. 464
Funeral Directors, F.S. 470
Engineers, F.S. 471
Veterinarians, F.S. 474
Opticians, F.S. 485
Pharmacists, F.S. 465
Dentists, F.S. 466
Architects, F.S. 467

The court is aware that even the regulation of attorneys-at-law, which though not regulated by statute, but rather by the integrated rules of the Bar and the Supreme Court of the State of Florida, requires the highest possible moral standards, character and integrity, **but does not impose upon its licensed members mandatory revocation of their license to practice, as a penalty,** but each situation involving a member of that profession is

judged and penalized in accordance with the facts and circumstances in each particular case.

It is revealing to this court that the section of the statute here under attack is the only statute of those regulating professions in the State of Florida where mere confinement in "a State or Federal prison" is sufficient grounds for revocation of the registration of a professional license, and that it is the only statute in Florida which attempts to regulate business conduct of the professions, which makes **mandatory** the revocation of a license or registration.

Unrebutted and irrefuted by the Defendants in their argument pleadings and Memorandum of Law, stands the above statement submitted by the Plaintiff, together with the Plaintiff's charge that "Research involving the Real Estate Statutes of laws of States in the United States found that no other State imposes the penalty of **mandatory revocation** for having committed a crime or other violation."

To permit in the instant case the revocation of the Plaintiff's professional license in the face of the above facts and statutory authority, would be to deny to the Plaintiff the constitutional right of equal treatment under the law, and would be contrary to the constitutional guarantees of equal protection of the law, in accordance with Section 1 of the Declaration of Rights of the Florida Constitution, and do violence to the guarantees granted under Article XIV of the Constitution of the United States."

It appears repugnant to this court to take away the license of a professional person for the infraction of a

law for which that person has already paid the penalty and which penalty has been imposed upon that person by another court and has already been paid as his debt to society by that person.

Were it necessary for this court to find further and additional bases for a declaration of the unconstitutionality of the Section of the Florida Statue here under attack, the court would but have to point up that this appears clearly to be the imposition of further and additional penalty; that is, to cause the Plaintiff to lose his license in addition to having paid his debt to society prescribed by another court in an unrelated matter, as constituting a violation of the Eighth Amendment of the Constitution of the United States of America, by virtue of the imposition, thusly, of:

"cruel and unusual punishment."

Our courts are not prone to and never knowingly do, nor should they, impose a penalty upon a person "twice for the same offense."

It was well said by someone during these proceedings, it being appropriately true, as a matter of fact, and proper as a matter of law, that a Statute which "has a penal effect, such as Sub-Section (2) of Florida Statute 475.25, here under attack, had better be 'unequivocally constitutional' beyond a shadow of possible harmful error in its application."

This court, therefore finds, Sub-Section (2) of Florida Statute 475.25, which is challenged by the Plaintiff in this cause, unreasonable, unconstitutional, void and invalid.

Done and ordered in chambers at Miami, Dade County, Florida, this 11 day of July, A.D., 1960.

George E. Holt
Circuit Judge

APPENDIX B

(Bare majority of reversal and dissenting opinions of Supreme Court of Florida)

SUPREME COURT OF FLORIDA
OCTOBER 25, 1961.
CASE NO. 31,102.

FLORIDA REAL ESTATE COMMISSION, a statutory commission under the Laws of the State of Florida, et al.,

Appellants,

—vs.—

MILTON J. HARRIS,

Appellee.

Rehearing Denied Dec 11, 1961.

Action to enjoin the Florida Real Estate Commission from interfering with the retention by a broker of his registration certificate. From an adverse final decree

of the Circuit Court, Dade County, George E. Holt, J., the Commission appealed directly to the Supreme Court. The Supreme Court, Drew, J., held that a determination, in a prior certiorari proceeding to review the Commission's action in revoking the broker's registration because of the broker's confinement in a federal prison for income tax evasion, that such confinement was sufficient to authorize revocation was res judicata, where that decision was permitted to become final without appeal.

Reversed with directions.

Thomas, Terrell and Hobson, JJ., dissented.

1. Courts

Denial by Supreme Court of certiorari, sought to review certiorari proceeding to review action of Florida Real Estate Commission in revoking broker's registration, decided nothing except that Supreme Court chose not to grant the writ.

2. Judgment

Determination in prior certiorari proceeding to review action of Florida Real Estate Commission in revoking broker's registration because of broker's confinement in federal prison for income tax evasion that such confinement was sufficient to authorize revocation was res judicata of issues in broker's subsequent action to enjoin commission from interfering with retention by broker of registration certificate, where decision in prior case was permitted to become final without timely appeal. F.S.A.Const. art. 5; § 4(2); 31 F.S.A. Florida Appellate Rules, rule 2.1, subd. a(5) (a); F.S.A. § 475.25(2); F.S.A.Const. Declaration of Rights, § 12; F.S.A. § 59.08.

3. Appeal and Error

Supreme Court does not favor piecemeal review or the allowing a litigant right to two appeals.

4. Judgment

A judgment is conclusive as to defenses which have or might have been set up.

Benjamin T. Shuman and Frank A. Wilkinson, Winter Park, for appellants.

Julius Jay Perlmutter, Miami Beach, for appellee.

DREW, Justice.

This appeal comes directly to this Court pursuant to Article V, Section 4(2), Constitution of the State of Florida F.S.A. and Rule 2.1, subd. a(5) (a), Florida Appellate Rules, 31 F.S.A. The present appellants (hereafter called the Commission) were defendants below in injunctive proceedings brought by the appellee (hereafter called the broker). The commission revoked the broker's registration by its order dated June 18, 1958[1] due to confinement

---

[1]The germane portions of the order of revocation of the Commission follow:

"That the defendant Milton J. Harris is now, and was at the time of the filing of the Information in this cause and at all times hereinafter mentioned, a registered real estate broker, and that the defendant Milton J. Harris was on the 20th day of April, A. D. 1956, adjudged to have been convicted upon a verdict of guilty of the offense of knowingly and willfully attempting to evade a large part of the income tax

in a federal institution for the offense of income tax evasion. Review of the revocation order was affirmed by the circuit court, certiorari to review such affirmance was denied in the District Court of Appeal, Third District[2] and in this Court.[3] Thereafter the broker filed a complaint in circuit court asserting the unconstitutionality of Section 475.25(2), Florida Statutes (1957), F.S.A. and to enjoin the Commission from interfering with the broker's retention of his registration certificate.[4] The circuit court,

---

due and owing by him to the United States of America for the calendar year 1946, and pursuant thereto, was sentenced for a period of six months and fined the sum of $2,000.00 and that thereafter in accordance with due process of law, the defendant was ordered and directed to surrender at the office of the United States Marshal, Tallahassee, Florida, on or before 12:00 o'clock noon on the 7th day of January, A. D. 1958, to commence the sentence imposed upon him as aforesaid, pursuant to which order the defendant did so surrender and was confined in the Federal Correctional Institution at Tallahassee, and that by reason thereof, revocation of the defendant's registration as a registered real estate broker is mandatory under the provisions of Section 475.25(2), Florida Statutes.

"It is therefore, Ordered and Adjudged that the registration of the defendant, Milton J. Harris, as a registered real estate broker be, and the same is hereby, revoked."

[2]Harris v. Condermann, Fla. App. 1959, 113 So.2d 235.

[3]Certiorari denied without opinion, Fla. 1959, 117 So.2d 495.

[4]Pertinent portions of the complaint follow:

"D. That the plaintiff has been in the real estate business for the past 38 years, that he is 59 years of age, and has never been involved in any negotiation or real estate business undertaking which was not above circumspection; that he has worked with clients in most of the states in the United States and foreign countries without any adverse results, publicity, complaints or criticism.

"E. More particularly, Plaintiff never had his license suspended or revoked by the Florida Real Estate Commission for even one minute for any act or action on his part or any course of conduct requiring criticism.

"F. Most specifically, Plaintiff was never charged, convicted or confined in any prison, certainly not 'in any State or Federal prison' in connection with any transaction or attempted transaction, effort, service, or function as a registered real estate broker of the State of Florida during his entire career as a real estate broker.

in acting favorably to the broker in this later litigation, held:

> "The challenged Sub-Section (2) of Florida Statute 475.25 is unconstitutional and invalid, and shall not apply to the position and cause of the plaintiff."

V.

"That the plaintiff is entitled by virtue of his compliance with the Real Estate License Law requirements of Florida to function and operate a real estate brokerage operation as a duly licensed real estate broker; and that such right is a constitutional one which cannot and should not be permitted to be abridged.

VI.

"Florida Statute 475.25, Section (2) recited that:

"'The registration of a registrant shall be revoked, if such registration, or a certificate issued thereon, is found to have been obtained by the registrant by means of fraud, misrepresentation or concealment, or if the registrant has become a nonresident of the State of Florida, *or is confined in any state or federal prison or insane asylum*, or through mental disease or deterioration, the registrant can no longer safely be entrusted to deal with the public or in a confidential capacity; and a registration or a certificate may be revoked or cancelled, without prejudice to filing a proper application, or request for certificate, if the same shal have been granted or issued through the mistake or inadvertence of the commission.' (Emphasis supplied.).

"Florida Statute 475.25(2) provides for revocation of the registration of a real estate broker by the Florida Real Estate Commission, if a broker '• • • is confined in any state or federal prison', and there can be no doubt that that section of the statute, (2), under which revocation proceedings were held, is unconstitutional.

"• • • • • • •

"The Plaintiff was confined in a Federal prison after having been convicted in Federal Court of an offense *(wholly unconnected with any phase of his brokerage business or his functions as a registered and licensed real estate broker)*, as a result of which he was subjected to confinement (for a period of 113 days) in the Federal Correctional Institute in Tallahassee, Florida.

"• • • • • • •

"WHEREFORE, Plaintiff being without remedy in the premises save in a Court of Equity, Prays:

"A. That this Court by the Entry, without notice of a Temporary Decree enjoin and restrain the Florida Real Estate Commission, a

This appeal is from that final decree.

The two issues vital to the decision have been stated by the Commission inter alia as:

> Where a petition for certiorari, filed as a method of seeking appellate review of an administrative order entered against a real estate broker under the provisions of Chapter 475, Florida Statutes is denied, is the cause between the parties res judicata so as to preclude an order enjoining the enforcement of the administrative order against the broker?
>
> and
>
> Is the word, "confined" as used in subsection 475.25(2) Florida Statutes, so vague and indefinite as to constitute said act invalid as either the invalid delegation of a legislative power or the legislative delegation of an invalid power?

These questions will be considered seriatim.

Statutory Commission under the laws of the State of Florida, and Robert T. Brinkley, Chairman, James R. Boring, Vice-Chairman, and Sylvan M. Maxwell, Commissioner, as and Constituting the Members of the said Commission, its employees and servants from enforcing its arbitrary, unreasonable and unconstitutional interpretation of that certain Section (2) of Florida Statute 475.25, and enjoin the said Defendants, their employees and servants from interfering with Plaintiff's retention of his registration certificate and his operation as a licensed real estate broker in the State of Florida; and

"B. That this Court by its entry of a Final Decree establish and declare that Section (2) of Florida Statute 475.25 is arbitrary, unreasonable and unconstitutional; and,

"C. That this Court grant such other and further relief as to it may seem just and proper."

Section 475.25(2) provides for the revocation of the registration of a real estate broker by the Florida Real Estate Commission, if a broker "* * * is confined in any state or federal prison, or insane asylum * * *."

[1,2] In the first proceedings the broker did not allege the unconstitutionality of the relevant section. The certiorari proceeding in the district court did not reach the merits, but was dismissed for failure to file within the time provided for applications for certiorari. This Court denied certiorari without opinion which, under numerous decisions of this Court, decides nothing except that we chose not to grant the writ. It is, therefore, to the petition for writ of certiorari filed in the circuit court and that court's order disposing of the case that we must turn to determine if the matters at issue or the points controverted were actually litigated and were, therefore, res adjudicata. The germane portions of the petition are to be found in sections 10 and 11:

> "10. That by reason of said revocation, the said Florida Real Estate Commission exceeded the bounds of its duly constituted authority and such order of revocation was contrary to the Constitution of the State of Florida, and violates Section 12 of the Declaration of Rights of the Florida Constitution which in part provides:
>
> "'No person shall * * * be deprived of life, liberty or property without due process of law.'
>
> "11. That it is evident from the record that the Florida Real Estate Commission exceeded its bounds and authority under the duly constituted

law, and your petitioner was deprived of a full and complete hearing under the due process of law, and from the record, itself, it is evident that the license of your petitioner should not have been revoked."

In denying the petition the circuit court construed the statute in question stating:

"This cause came on to be heard on the 11th day of December 1958 upon a Petition for Writ of Certiorari filed by Milton J. Harris, the record before the Florida Real Estate Commission and the briefs filed by the respective parties hereto and the Court having heard and considered the oral argument of counsel for the respective parties and being fully advised in the premises is of the opinion that the language of Chapter [section] 475.25(2) " * * is confined in any State or Federal prison * * " relates to the time the information is filed or served upon the registrant or real estate licensee and not to the time that the licensee files his answer or reply. The undisputed facts in this case reflect that the Petitioner was in fact confined in the Federal Correctional Institution at Tallahassee, Florida (conceded to be a Federal prison within the meaning of the statute) and that he was so confined at the time his motion for enlargement of time in which to file his answer was filed with the commission. As a matter of fact, it was upon this ground that the commission extended the time in which to file his answer or reply. However at the time the answer was filed, the Peti-

tioner was no longer actually 'confined' in the Federal prison. Petitioners principal contention is that since he was no longer confined at the time of filing his reply or answer that the above mentioned statute is not applicable to him. With this contention the Court does not agree.

"To give a construction to the statute contended for by the Petitioner would not be construing the statute strictly, but would be giving it a strained construction. While it is not necessary insofar as the facts in this case are concerned to rule that confinement in a State or Federal prison would be prejudicial to a licensee even though the Information was filed subsequent to the period of confinement, it is apparent that the legislative intent was to make such confinement a ground for revocation. In this case the confinement was in existence and present when the petition was filed. This is sufficient under the statute to revoke.

"The Court has examined the other questions involved and finds no denial of any substantial constitutional or statutory right.

"It is therefore, Ordered, Adjudged and Decreed that the Petition for Writ of Certiorari be and the same is hereby denied."

[3, 4] We neither favor piecemeal review nor the allowing a litigant the right to two appeals.[3] We have

[3] Sax Enterprises, Inc. v. David & Dash, Fla.1958, 107 So.2d 612.
[4] Lake v. Lake, Fla.1958, 103 So.2d 639.

held many times that a judgment is conclusive as to defenses which have or might have been set up.[7]

In the Codomo case,[8] decided by this Court approximately a year prior to the foregoing decision disposing of the petition for writ of certiorari by the Dade County Circuit Court, this Court held that the circuit court had jurisdiction to review by certiorari an order of the Florida Real Estate Commission as was done in this case. Moreover, in the Furen[9] case, this Court determined that where the jurisdiction of the circuit court was properly invoked to review the actions of administrative officers, boards, commissions or other tribunals, such proceedings became for the first time a case within the judicial system of the state government. This being true, the decision of the circuit court, in passing upon the matters presented to it in the petition for certiorari by the broker in this cause, became a judgment of a trial court of this state subject to review by an appropriate appellate court under the applicable provisions of the Florida Constitution and the Flor-

---

[7] "A judgment or decree unreversed is conclusive upon parties and estops them from setting up in a new suit brought to annul or set it aside, any matter of defense of which the parties could have availed themselves in the original proceeding, the evidence of the facts constituting the defense having been known to the parties in due time."

Mattair v. Card, 1882, 19 Fla. 455; Hay v. Salisbury, 1926, 92 Fla. 446, 109 So. 617, 621. This is also applicable to the situation where the second suit is upon the same cause of action and between the same parties as the first where the final judgment in the first suit is conclusive in the second suit as to every question that was presented or might have been on the pleadings presented and determined in the first suit. Prall v. Prall, 1909, 58 Fla. 496, 50 So. 867, 26 L.R.A., N.S., 577; Tilton v. Horton, 1931, 103 Fla. 497, 137 So. 801, 1932, 139 So. 142.

[8] Codomo v. Shaw, Fla.1958, 99 So.2d 849.

[9] State of Florida v. Furen, Fla.1960, 118 So.2d 6.

ida Appellate Rules.[10] If, as in this instance, the circuit court directly passed upon the validity of a state statute, such decree became reviewable by direct appeal to this Court,[11] if our jurisdiction were invoked within the time fixed by the Legislature for that purpose.[12]

There is no authority for the procedure followed by the broker in his attempt to review the actions of the circuit court in the manner attempted and more fully discussed in the preceding portions of this opinion, even had such action been taken within the period allowed by statute. All of this leads to the inescapable conclusion that, insofar as the revocation of this broker's license by this commission is concerned, the decree of the Circuit Court of Dade County in the original certiorari proceeding upholding the revocation of the license became final as between these parties upon the expiration of the appeal period. The cause of action and the parties in the subsequent proceedings (the proceedings involved directly in this appeal) were identical and, as between these parties, the matter was res adjudicata. This defense, properly and timely interposed by the commission in the trial court should have been sustained by it. It was error to fail to do so.

The conclusion we reach precludes us from passing upon the validity of the questioned statute.[13] We particularly do not pass upon that portion of it which provides

---

[10]Article V, Section 5(3), Constitution of the State of Florida, F.S.A.; Rule 2.2(4), Florida Appellate Rules 31 F.S.A.

[11]Article V, Section 4(2), Constitution of the State of Florida, F.S.A.

[12]Section 59.08, Florida Statutes 1959, F.S.A.

[13]P. C. Lissenden v. Board of County Commissioners, Fla.1960, 116 So.2d 632.

for the revocation of a broker's license in the event he "is confined in any state or federal prison or insane asylum". Moreover, neither do we decide the question of whether this broker, having admittedly been duly convicted of the offense of income tax evasion and having been admittedly legally imprisoned for nearly four months in a federal prison is so affected by said statute as to be in a position to question its constitutionality in this respect.[1]

The decree of the circuit court is reversed with directions to dismiss the complaint.

ROBERTS, C. J., and THORNAL and O'CONNELL, JJ., concur.

TERRELL, THOMAS and HOBSON, JJ., dissent.

THOMAS, Justice (dissenting).

"The opinion begins with the statement that the appeal has come direct to this court under the provisions of Sec. 4(2), Art. V of the Constitution and Rule 2.1, subd. a(5) (a), Florida Appellate Rules, that such an appeal may be taken to this court "as a matter of right" from a judgment or decree directly determining the validity of a state statute.

"The opinion ends with the declaration that because of the attitude toward other features of the litigation the court is *precluded* "from pass-

[1]6 Fla. Jur. Constit. Law, Sect. 60 et seq. (1936); 11 Am. Jur. Constit. Law, Sect. 111 et seq. (1937).

ing upon the validity of the questioned statute." With such a position I cannot agree.

"There can be no doubt from the simple wording of the constitutional guaranty that a right of appeal to this court vests in a litigant the moment a judgment or decree is entered judging the validity or invalidity of a state statute. My concern is with the duty of this court once the case arrives here. It seems to me inconsistent to recognize the appeal from such a judgment or decree as a vehicle to bring into play the power of this court to review and then to discard the basic question as unnecessary of decision and adjudicate other issues which, without the basic question would be matters for decision by District Courts of Appeal."

Of course, the constitutional question must be substantial. Evans v. Carroll, Fla., 104 So.2d 375. If found to be merely colorable, as in that case, the matter will be transferred to the District Court of Appeal. The order of the cited case is significant here: "*All other points raised relate to matters within the ordinary appellate jurisdiction of the district courts.* In accord with 31 F.S.A. Rule 2.1, subd. a(5)(d), Florida Appellate Rules [providing for transfer of a cause to the appellate court having jurisdiction where the jurisdiction of another appellate court has been improvidently invoked] *the notice of appeal and all other papers filed herein shall at the expiration of five days from the filing of this opinion be transferred* to the District Court of Appeal of Florida, Second District." (Italics supplied.)

So in the cited case, the court decided that as the constitutional question was colorable the case would be transferred to the District Court of Appeal which had jurisdiction to determine all other issues; in this case all other issues are entertained although the constitutional question need not even be decided. A comparison of the reasoning in the cited and present cases brings the strange result that the court will shun a case in which the constitutional question is colorable and embrace one in which such a question is nonessential.

For scores of years, it was a familiar rule that a court would not pass upon the constitutionality of an act unless it was necessary to a disposition of a case. But this rule seems now to be inapposite because of the respective jurisdictions of the Supreme Court and the District Courts of Appeal as defined in the amendment of Article V of the Constitution, effective 1 July 1957.

Before that time a case like this would have come here with or without a direct ruling on the constitutionality of a statute so that if a decision of that question was declined the jurisdiction to dispose of other questions would not be disturbed. Now the system is quite different because in the absence of a substantial constitutional question of the kind defined in the Constitution, the jurisdiction of this court cannot attach and the power to determine related matters is exclusively that of the District Courts of Appeal.

Perhaps the opinion of the court on the issues irrespective of the basic constitutional jurisdictional question is correct, but I cannot agree that the court can discard that question and retain jurisdiction of the other matters

which without it fall within the jurisdiction of the District Court of Appeal.

I cannot agree that the jurisdictional feature now said to be irrelevant can be used at once to vest jurisdiction in this court and divest the District Court of Appeal of the power that tribunal exercises by virtue of express provision of the Constitution. In my opinion, if this court decides that the question so lacks relevancy that it should be disregarded then the power of this court ceases and an attempt to go further amounts to usurpation of the power of the District Court of Appeal.

In sum, it is my conviction that this court should either pass upon the ruling dealing with the constitutionality of the act in question or transfer the case to the District Court of Appeal where it belongs.

I dissent.

TERRELL and HOBSON, JJ., concur.

APPENDIX C

(Order denying motion to recall mandate of reversal and dismiss appeal).

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1962
TUESDAY, FEBRUARY 6, 1962

THE FLORIDA REAL ESTATE COMMISSION,
a Statutory Commission under the Laws
of the State of Florida, et al.,

Appellants,

vs.

MILTON J. HARRIS,

Appellee.

The appellee in the above cause has filed a motion to recall the mandate in the above entitled cause, set aside the Court's order of reversal, and dismiss the appellants' purported appeal, and upon consideration thereof, it is ordered that said motion be and the same is hereby denied.

A True Copy

TEST:

GUYTE P. McCORD
Clerk Supreme Court.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 2 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted]100

1962

MILTON J. HARRIS
Appellant,

versus

THE FLORIDA REAL ESTATE COMMISSION,
a Statutory Commission under the Laws of the
State of Florida, et al.,
Appellees,

APPEAL FROM THE SUPREME COURT
OF FLORIDA

APPELLEES' MOTION TO DISMISS OR AFFIRM

BENJAMIN T. SHUMAN
General Counsel
Florida Real Estate Commission
State Office Building
West Morse Boulevard
Winter Park, Florida
Attorney for Appellees

BREWTON CO.—ORLANDO

SUBJECT INDEX

	Page
Motion of Appellee to Dismiss Appeal or Affirm	1
Statement of the Case	2
Questions Presented by Appellant	4
Argument	5
Conclusion	9
Certificate of Mailing	10
Appendix	11

Table of Authorities Cited

CASES

FEDERAL

	Page
Charles P. Chouteau and Julia Maffit vs. Charles Gibson, 111 U.S. 200, 28 L. Ed 400	5
City and County of San Francisco vs. Andrew J. Itsell, 133 U.S. 65, 33 L. Ed 570	7
Durley vs. Mayo, 76 S. Ct. 806, 351 U.S. 277, 100 L. Ed 1178	8
People of the State of California ex rel Bryant vs. S. W. Holladay et al, 159 U.S. 415, 40 L. Ed 202	7
Wolfe vs. North Carolina, 364 U.S. 177, 4 L. Ed 26 1650, 80 S. Ct. 1482	8

INDEX

STATE

	Page
Continental National Building and Loan Association et al vs. Miller et al, 26 So 725	8
Milton J. Harris vs. Joseph Condermann and the Florida Real Estate Commission, 113 So 2d 235	3
Milton J. Harris vs. Joseph Condermann and the Florida Real Estate Commission, 117 So 2d 495	3
Seaboard Airline Railroad Co. vs. Henry M. Holt, 80 So 2d 354	8
The Florida Real Estate Commission vs. Milton J. Harris, 134 So 2d 785	4

IN THE

SUPREME COURT OF THE UNITED STATES

No. ____

MILTON J. HARRIS
Appellant,

versus

THE FLORIDA REAL ESTATE COMMISSION,
a Statutory Commission under the Laws of the
State of Florida, et al.,
Appellees,

APPEAL FROM THE SUPREME COURT
OF FLORIDA

MOTION OF APPELLEE TO DISMISS APPEAL OR AFFIRM

The Appellee, Florida Real Estate Commission, pursuant to Rule 16, Revised Rules of the Supreme Court of the United States, moves this Honorable Court to dismiss the appeal in the above entitled case on the grounds that: (a) the appeal does not present a substantial Federal question; (b) the Judgment and Order appealed from rests on an adequate non-Federal basis; and (c) the Federal questions, if any, were not timely raised.

The Appellee further moves this Honorable Court, in the alternative, as to the appeal from the order of the Supreme Court of Florida, to affirm on the grounds that it is manifest that the questions on which the decision of the cause (the Order denying Petition to recall mandate) are so unsubstantial as not to need further argument.

APPENDIX

There is appended hereto a copy of the petition to recall the mandate of the Supreme Court of Florida. Other items necessary for the Court's consideration of these Motions affirmatively appear in the decision appealed from which is set forth in its entirety in Appellant's Appendix.

STATEMENT OF THE CASE

This case includes: (a) an appeal from a final decision of the Supreme Court of the State of Florida reversing a Final Decree entered by the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, with directions to dismiss the complaint; and (b) an appeal from an Order of the Supreme Court of Florida denying a Petition to recall the mandate issued pursuant to the final decision mentioned above.

This case is the culmination of a series of cases which, for the sake of clarity, are briefly recited as follows:

Case No. 1. *Joseph Condermann*, Plaintiff, vs. *Milton J. Harris*, Defendant, Progress Docket No. 998, before the Florida Real Estate Commission. This case was an administrative proceeding terminating in an Order entered the 18th day of June, 1958, revoking the Defendant's real estate broker's registration upon the ground that the Defendant had violated the

provisions of Section 475.25(2), Florida Statutes, by reason of his confinement in a Federal prison.

Case No. 2. *Milton J. Harris*, Petitioner, vs. *Joseph Condermann* and the *Florida Real Estate Commission*, Respondents, CVA 1901, before the Circuit Court, Dade County, Florida. This case presented a Petition for Certiorari to review the Order of the Florida Real Estate Commission noted in Case No. 1. Certiorari was denied on the 12th day of December, 1958. The opinion and Order of the Court is recited in full in the decision of the Supreme Court of Florida now on appeal.

Case No. 3. *Milton J. Harris*, Petitioner, vs. *Joseph Condermann* and the Florida Real Estate Commission, Respondents, Case No. 59-230, before the District Court of Appeals, Third Appellate District of Florida. This case was an abortive attempt to have the District Court of Appeals review by Certiorari the Order of the Circuit Court denying certiorari. The Petition was dismissed sua sponte by Order dated the 29th day of April, 1959. Rehearing was denied with opinion June 9, 1959. This case is reported at 113 So. 2d 235.

Case No. 4. *Milton J. Harris*, Petitioner, vs. *Joseph Condermann* and the *Florida Real Estate Commission*, before the Supreme Court of Florida. This case sought the review by Certiorari of the sua sponte dismissal Order and denial of Petition for rehearing entered by the District Court of Appeal. Certiorari was denied without opinion on the 20th day of October, 1959. This case is reported at 117 So. 2d 495.

Case No. 5. *Milton J. Harris*, Plaintiff, vs. the *Florida Real Estate Commission*, et al., Defendants, 59C11355, before the Circuit Court, Dade County, Florida. This case presented a complaint for injunctive relief seeking to enjoin the enforcement of the Order of revocation entered by the Florida Real Estate Commission. The complaint was filed and temporary injunction issued on the 30th day of November, 1959. Final decree was entered on the 11th day of July, 1960, holding Section 475.25(2), Florida Statutes, unconstitutional, after the Court had denied Defendants' Motions to Dissolve the Temporary Injunction and to Dismiss the Complaint.

Case No. 6. *The Florida Real Estate Commission*, Appellant, vs. *Milton J. Harris*, Appellee, Case No. 31,102, before the Supreme Court of Florida. This case was an appeal from the final decree and Orders entered by the Circuit Court in Case No. 5, above. On October 25, 1961, the Court entered its decision reversing the Circuit Court with directions to dismiss the complaint. This opinion is reported at 134 So. 2d 785. On the 25th day of January, 1962, Appellee filed a Petition to recall the mandate which had issued. On February 6, 1962, said Petition was denied. This case is now presented to the Supreme Court of the United States in an attempt to obtain review of the decisions of the Supreme Court of Florida.

QUESTIONS PRESENTED BY APPELLANT

The Notice of Appeal and Jurisdictional Statement presents two questions. Question No. 1, as stated by the

Appellant, seeks to have this Court determine the constitutionality of Section 475.25(2), Florida Statutes, upon two grounds, namely: (a) Is the Statute discriminatory and a denial of due process; and (b) Is the Statute an unconstitutional delegation of legislative authority. Question No. 2, as stated by the Appellant, seeks to have this Court determine the validity of the Order of the Supreme Court of Florida denying the Petition to recall its mandate upon the ground that the same was a denial of due process.

ARGUMENT

The Appellee respectfully submits that the decision of the Supreme Court of the State of Florida rests solely upon the question of whether the cause of action in Circuit Court Case No. 5, recited above, was barred by reason of its prior adjudication in Circuit Court Case No. 2, recited above.

The language of the State Court makes it abundantly clear that the Court declined to decide any of the constitutional questions (State or Federal) which may have been presented.

Under the decisions of the Supreme Court of the United States, it has been often and repeatedly held that a State Court decision upon the question of prior adjudication in a state court is not only final, but as well, binding upon the Supreme Court of the United States, and that an appeal from the state court to review such a decision presents no Federal question.

These principles were stated by this Honorable Court in the case of *Charles P. Chouteau and Julia Maffit* vs. *Charles Gibson*, 111 U.S. 200, 28 L. Ed. 400, and have

been consistently followed. Said case presented to this Court the very question involved in the case at Bar. That is, it was an appeal to review a decision of a State Supreme Court (Missouri) holding a state court proceeding barred by prior adjudication. The appeal was dismissed upon Appellee's Motion.

The language of Mr. Chief Justice Waite in that case more than adequately summarizes the Appellee's contention in the case at Bar in the following manner:

> "The court below has decided that the pleadings were sufficient; that the equitable defense could be made, and that the judgment in that action in favor of Gibson was, in its legal effect, a judgment that Chouteau and Maffit had no title to the land in controversy. Consequently, that judgment was a bar to this action and precluded the court below as well as this court from re-opening the original litigation, and considering again the questions that were put at rest between the parties by the decision in their former suit. It is apparent, therefore, that no federal question which there may have been in the case was decided by the state court, and that the decision of such a question was not necessary to the final decree rendered."

In the case at Bar, the Supreme Court of the State of Florida passed directly upon the jurisdiction of the Circuit Court in Case No. 2, recited hereinbefore; the sufficiency of the pleadings; and the judgment. It determined that Case No. 2, laid to rest all questions which were presented and which could have been presented and that by reason thereof Case No. 5 was barred.

The Federal questions submitted by Appellant as to the constitutionality of Section 475.25(2), Florida Statutes, were laid to rest in Case No. 2; could not be reached in

Case No. 5, and it was decided in the case at Bar by the Supreme Court of Florida.

The lack of jurisdiction of this Honorable Court, under the circumstances, was decided also in the cases of: *City and County of San Francisco* vs. *Andrew J. Itsell*, 133 U. S. 65, 33 L. Ed. 570, citing the Chouteau case, supra, and *People of the State of California ex rel: Bryant* vs. *S. W. Holladay et al.*, 159 U. S. 415, 40 L. Ed. 202, and in each of these cases the appeal from such a decision of a state court was dismissed.

Appellee would make but one further comment respecting the matters set forth in Appellant's jurisdictional statement. That is, the lower court's decision was not "split" upon the question of res judicata. It was instead "split" upon disposition, once res judicata had been determined.

The Appellee respectfully submits that Question No. 2, as stated by the Appellant, is presented for the first time by the Notice of Appeal and the jurisdictional statement in this court. The question was not presented to the Supreme Court of Florida by the Petition or otherwise.

Appellee's Appendix "A" sets forth said Petition to recall the mandate in its entirety from which, in view of the order entered, it affirmatively appears that the question was not raised, or passed upon by the Supreme Court of the State of Florida.

It further affirmatively appears from the Petition and Order that the Supreme Court of Florida was called upon to do nothing more than decide whether procedural aspects of the case were sufficient under rules of Appellate

procedure adopted by the Court itself. Such a question has since the "beginning" been within the exclusive province of the state courts.

Not only is there a complete absence of a Federal question, but the decision of the state court upon such a manner is binding upon this Honorable Court, and the decision could have rested upon any one of several state questions. See *Seaboard Airline Railroad Company* vs. *Henry M. Holt*, 80 So. 2d 354, *Continental National Building and Loan Association, et al.* vs. *Miller et al.*, 26 So. 725. See also *Durley* vs. *Mayo*, 76 S. Ct. 806, 351 U. S. 277, 100 L. Ed. 1178.

It has been repeatedly decided by this Court that a state court's determination of its jurisdiction and procedures is binding on this Court. See *Wolfe* vs. *North Carolina*, 364 U. S. 177, 4 L. Ed. 2d 1650, 80 S. Ct. 1482, and cases cited therein.

Since no Federal question was presented, it must be presumed the decision rested on state law.

However, should this Honorable Court take the view that the question of due process as stated by the Appellant in Question No. 2 has been timely and properly raised and does present a Federal question, notwithstanding the foregoing, then the Appellee respectfully submits that the existence of the fundamentals of due process resolved by this Court in its many decisions on the subject are so patently manifest from arguments of Appellant and the recitations in the decision of the Supreme Court of Florida as to render the question completely devoid of merit.

Appellant wholly fails to set forth, directly or by im-

plication any fundamental omission so far as the requisites of due process are concerned. None is even alleged.

For this reason, it is respectfully submitted that the question as presented should not be dignified by the deliberations of this Honorable Court, and at the very most, so far as the contentions of Appellant are concerned, should be affirmed.

CONCLUSION

This Court lacks, or will not assume, jurisdiction to review a state court decision upon the question whether a cause is res judicata in a prior state action since no Federal question is presented thereby. Such Federal questions, if any, as may have existed lay behind the defense of res judicata and can not be reopened or considered by the Court. The Order denying the petition to recall the mandate involved no Federal question which was timely raised or presented, and rested or could have rested on state law alone. The appeal should be dismissed.

The question of due process of law allegedly presented by the Order denying the petition to recall the mandate is so manifestly unsubstantial as to need no further argument. The appeal, if not dismissed, should be affirmed.

Respectfully submitted,

BENJAMIN T. SHUMAN
General Counsel
Florida Real Estate Commission
State Office Building
West Morse Boulevard
Winter Park, Florida
Attorney for Appellees

CERTIFICATE OF MAILING

I, Benjamin T. Shuman, Attorney for Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of May, 1962, I served copies of the foregoing Appellees' Motion to Dismiss or Affirm, together with the Appendix thereto, by mailing said copies in a duly addressed envelope with sufficient United States Air Mail postage prepaid to: Burton B. Loebl, 1880 N. E. 170th Street; North Miami Beach, Florida, and M. H. Rosenhouse and D. L. Rosenhouse, in care of Rosenhouse & Rosenhouse, 910 Olympia Building, Miami, Florida, Attorneys for Appellant, and deposited the same in a United States Post Office or mail box at Winter Park, Florida, on said day.

BENJAMIN T. SHUMAN
General Counsel
Florida Real Estate Commission
State Office Building
West Morse Boulevard
Winter Park, Florida
Attorney for Appellees

APPELLEE'S MOTION TO RECALL THE MANDATE OF THE SUPREME COURT OF FLORIDA

(Formal parts omitted)

* * * * *

The Appellee, *Milton J. Harris*, in the above entitled cause, moves this Honorable Court to recall its mandate therein to the Circuit Court of Dade County, Florida, and to dismiss the Appellants' purported appeal filed herein on the ground that Appellents' purported appeal violated the mandatory provisions of the Florida Appellate Rule 3.2(c) and was insufficient to give this Court jurisdiction to pass upon the purported appeal in that the Notice of Appeal did not contain, nor did any subsequent papers such as the directions to the Clerk and Assignments of Error contain the title of the Court to which the appeal is taken, and failed to contain and entirely omitted any title of any Court to which such appeal was taken (although the Appellants had the choice of appealing to more than one Court).

For the convenience of this Honorable Court a true copy of the purported Notice of Appeal is attached to this Motion and marked EXHIBIT 1.

Appellee further states:

(a) That this Notice of Appeal was, and is not sufficient to give this Court jurisdiction of said purported appeal.

(b) That Section (c) of Rule 3.2 of Florida Appellate Rules mandatorially requires that a Notice of Appeal

contain the title of the Court to which the appeal is taken "shall state . . . the title of the Court to which the appeal is taken." (underscoring supplied)

(c) That under Rule 3.2(c) the Notice of Appeal *may* be in the form approved by the Court but that the form of the Notice approved by this Court, Appellate Rule 7.2 follows the mandatory provisions of Appellate Rule 3.2(c) by providing "that he enters his appeal to the _____ Court of Florida to review the order, judgment or decree etc." That the said mandatory provision of Rule 3.2 being jurisdictional, cannot be waived.

(d) That the entire failure to set out to what court, or for that matter any court the Final Decree was appealed to was not in substantial compliance with the Rules and being jurisdictional, the failure to file a Motion to Dismiss within the prescribed time cannot waive the defect or omission, nor does the filing of a brief by Appellee create a waiver.

(e) That an Appeal from the Final Decree of the Circuit Court could be either to the District Court of Appeal or to the Supreme Court of Florida, but the said Notice which entirely omits to set forth to what court (any court) the appeal was taken, did not give to the Appellee, or to this Court, information to which Court the Appeal was taken, and surely no one could glean from the purported Notice of Appeal that the Appeal was taken directly to the Supreme Court of Florida, pursuant to Article 5, Sec. 4(2) Constitution of the State of Florida F S A, and Rule 2.1 Sub. (a) (5) (a) Florida Appellate Rules 31 F S A.

WHEREFORE, it is respectfully submitted that this Court on a hearing had in accordance with its Rules, re-

call the Mandate in the above entitled cause, set aside its Order of Reversal, and dismiss the Appellants' purported appeal because this Honorable Court had no jurisdiction to entertain the appeal.

Respectfully Submitted,

ROSENHOUSE & ROSENHOUSE
910 Olympia Building
Miami, Florida

BURTON B. LOEBL
1880 N. E. 170th Street
North Miami Beach, Florida

LEONARD PEPPER and
TURNBULL & HILL
Tallahassee, Florida

Attorneys for Appellee
MILTON J. HARRIS

BY s/ M. H. Rosenhouse
M. H. ROSENHOUSE
Of Counsel

I HEREBY CERTIFY that a copy of the above and foregoing Motion was mailed to: Honorable Benjamin T. Shuman, General Counsel, Florida Real Estate Commission, Florida Office Building, West Morse Boulevard, Winter Park, Florida, on this the 25 day of JANUARY, 1962.

s/ MHR
OF COUNSEL

JUN 29 1962
JOHN DAVIS, CLERK

Supreme Court of the United States

No. [redacted]100

October Term, 1961

MILTON J. HARRIS

Appellant,

versus

THE FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida, et al.,

Appellees,

APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

BURTON B. LOEBL
1880 N. E. 170th Street
North Miami Beach, Florida

ROSENHOUSE & ROSENHOUSE
910 Clympia Building
Miami, Florida

D. L. ROSENHOUSE
910 Olympia Building
Miami, Florida
Attorneys for Appellant

M. H. ROSENHOUSE
910 Olympia Building
Miami, Florida
Of Counsel for Appellant

INDEX

	Page
1. No Sufficient Predicate for Appellees' Motion To Dismiss or Affirm Because Florida Supreme Court's Bare Majority Reversal Opinion (4-3) Avoided Federal Questions, by Putting Forward Non-Federal Grounds of Decision Which Are Without Any Fair or Substantial Support. The Minority Opinion Affirmatively So Indicates.	2-6
2. The Bare Majority Reversal Opinion of the Supreme Court of Florida In Effect Upheld the Constitutionality of the Statute Which the Lower Court Declared Unconstitutional.	6
3. A Written Notice of Appeal Filed in the Lower Court Without Naming and Entirely Omitting To Name Any Appellate Court (Especially Where One Can Appeal to More Than One Court) Is a Nullity and Violative of the Due Process Clause.	7,8
Conclusion	9,10
Appendix	App. 1

TABLE OF AUTHORITIES

CASES:	Page
Real Estate Commission etal., v. Harris (Fla.) 134 So.2nd 786 (Minority Opinion Text 790-791)	2
Wolfe v. North Carolina, 364 U.S. 177, 4 L Ed. (2) 1650, 80 S. C. 1482	6
STATUTES:	
Sec. 475.25 (2) F. S. A. (Fla. Real Estate Brokers' Act)	9

Supreme Court of the United States

No. 930

October Term, 1961

MILTON J. HARRIS

Appellant,

versus

THE FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

Appellant, MILTON J. HARRIS, in the above entitled cause files his Brief in Opposition to Motion to Dismiss or Affirm, by Appellees, FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida, et al.

1. No Sufficient Predicate for Appellees' Motion To Dismiss or Affirm Because Florida Supreme Court's Bare Majority Reversal Opinion (4-3) Avoided Federal Questions, By Putting Forward Non-Federal Grounds of Decision Which Are Without Any Fair or Substantial Support. The Minority Opinion Affirmatively So Indicates.

The Supreme Court of Florida is composed of seven Justices, three of whom (long in point of service) Mr. Justice Terrell, Mr. Justice Hobson and Mr. Justice Thomas dissented. The dissenting written opinion by Mr. Justice Thomas was concurred in by the other two Justices, which opinion in no unmistakable words affirmatively indicates that the constitutional question was avoided by the majority.

The minority opinion is so succinct in this regard and so highly applicable to affirmatively show that Appellees' grounds contained in their Motion to Dismiss or Affirm are absolutely without foundation, that we take the liberty of setting out the dissenting minority opinion of Mr. Justice Thomas emphasizing those portions which we believe sustain our contention, and we believe in doing so we also avoid the elongation of this brief.

(MINORITY OPINION IN **FLORIDA REAL ESTATE COMMISSION VS. HARRIS**, 134 So. 2nd text 790 and 791).

"TERRELL, THOMAS and HOBSON, JJ., dissent.

THOMAS, Justice (dissenting)."

"The opinion begins with the statement that the appeal has come direct to this court under the provisions of Sec. 4(2), Art. V of the Constitution and Rule 2.1, subd. a(5) (a), Florida Appellate Rules, that such an appeal may be taken to this court "as a matter of right" from a judgment or decree directly determining the validity of a state statute.",

The opinion ends with the declaration that because of the attitude toward other features of the litigation the court is precluded "from passing upon the validity of the questioned statute." With such a position I cannot agree.

There can be no doubt from the simple wording of the constitutional guaranty that a right of appeal to this court vests in a litigant the moment a judgment or decree is entered judging the validity or invalidity of a state statute. My concern is with the duty of this court once the case arrives here. It seems to me inconsistent to recognize the appeal from such a judgment or decree as a vehicle to bring into play the power of this court to review and then to discard the basic question as unnecessary of decision and adjudicate other issues which, without the basic question would be matters for decision by District Courts of Appeal.

Of course, the constitutional question must be substantial. Evans v. Carroll, Fla., 104 So. 2d 375. If found to be merely colorable, as in that case, the matter will be transferred to the District Court of Appeal. The order of the cited case is significant here: "All other points raised relate to matters within the ordinary appellate jurisdiction of the district courts. In accord with 31 F.S.A. Rule 2.1, subd. a(5) (d), Florida Appellate Rules (provid-

ing for transfer of a cause to the appellate court having jurisdiction where the jurisdiction of another appellate court has been improvidently invoked the notice of appeal and all other papers filed herein shall at the expiration of five days from the filing of this opinion be transferred to the District Court of Appeal of Florida, Second District."

So in the cited case, the court decided that as the constitutional question was colorable the case would be transferred to the District Court of Appeal which had jurisdiction to determine all other issues; in this case all other issues are entertained although the constitutional question need not even be decided. A comparison of the reasoning in the cited and present cases brings the strange result that the court will shun a case in which the constitutional question is colorable and embrace one in which such a question is nonessential.

For scores of years, it was a familiar rule that a court would not pass upon the constitutionality of an act unless it was necessary to a disposition of the case. But this rule seems now to be inapposite because of the respective jurisdictions of the Supreme Court and the District Courts of Appeal as defined in the amendment of Article V of the Constitution, effective 1 July, 1957.

Before that time a case like this would have come here with or without a direct ruling on the constitutionality of a statute so that if a decision of that question was declined, the jurisdiction to dispose of other questions would not be disturbed. Now the system is quite different because in the absence of a substantial constitutional question of the kind defined in the Constitution, the

jurisdiction of this Court cannot attach and the power to determine related matters is exclusively that of the District Courts of Appeal.

Perhaps the opinion of the court on the issues irrespective of the basic constitutional jurisdictional question is correct, but I cannot agree that the court can discard that question and retain jurisdiction of the other matters which without it fall within the jurisdiction of the District Court of Appeal.

I cannot agree that the jurisdictional feature now said to be irrelevant can be used at once to vest jurisdiction in this court and divest the District Court of Appeal of the power that tribunal exercises by virtue of express provision of the Constitution. In my opinion, if this court decides that the question so lacks relevancy that it should be disregarded then the power of this court ceases and an attempt to go further amounts to usurpation of the power of the District Court of Appeal.

In sum, it is my conviction that this court should either pass upon the ruling dealing with the constitutionality of the act in question or transfer the case to the District Court of Appeal where it belongs.

I dissent.

TERRELL and HOBSON, JJ., concur."

It seems to the writer of this brief that the Appellees' only make a weak cry in the dark when they pit themselves against the written pronouncement of three venerable Justices of Florida's highest Court, and par-

ticularly is this true and applicable to the case at bar when in the very decision cited by the Appellees in their Motion to Dismiss or Affirm (Page 8) (**Wolfe vs. North Carolina,** 364 U. S. 177, 4 L ed. (2) 1650, 80 S.C. 1482) this Court (text 1487) stated:

> **"It is settled that a state court may not avoid deciding Federal questions and thus defeat the jurisdiction of this court by putting forward non-federal grounds of decision which are without any fair or substantial support."** (Emphasis ours)

2. The Bare Majority Reversal Opinion of The Supreme Court of Florida In Effect Upheld The Constitutionality of The Statute Which the Lower Court Declared Unconstitutional.

The bare majority reversal opinion of the Supreme Court of Florida, so far as the Appellant is concerned, upheld the constitutionality of the statute which the Circuit Court held unconstitutional, and forever set at rest the constitutionality of the statute as to him. There is no proceeding which could be taken by Appellant under State Law to attack the constitutionality of the statute after the pronouncement by the Supreme Court of reversal and dismissal of the complaint. It is submitted that what you cannot do directly you should not be able to do indirectly. The majority opinion of the Supreme Court of Florida, for all practical purposes, was a decision upholding the constitutionality of a statute which the Circuit Court held unconstitutional under both State and Federal Law. (See Appellant's Appendix A, pages 2 to 14)

3. A Written Notice of Appeal Filed in the Lower Court Without Naming, and Entirely Omitting To Name Any Appellate Court (Especially Where One Can Appeal to More Than One Court) Is a Nullity and Violative of the Due Process Clause.

Appellees' attach as Appendix A1 copy of Appellant's (Appellee in the Supreme Court of Florida) Motion to Recall the Mandate of the Supreme Court of Florida, but fail to attach a copy of the Notice of Appeal which was attached as an exhibit to said Motion. Appellant supplies this omission in this brief and labels the omitted Notice of Appeal Appendix 1.

It is to be noted that the Notice of Appeal is filed in the Circuit Court of Dade County, Florida, which court entered the Final Decree declaring the unconstitutionality of the attacked statute.

The Notice of Appeal entirely omits to name any Appellate Court. It is our contention that the failure to name any Appellate Court in any Notice of Appeal under any system of jurisprudence in the United States, either State or Federal, is a nullity, and does not afford due process. The naming of an Appellate Court to which an appeal is taken is a jurisdictional feature.

The provisions of the statute of Florida regarding appeals makes the naming of the Appellate Court mandatory, and well it should be. The naming of an Appellate Court in any appeal to give jurisdiction on appeal in any State or Federal Court, we submit is a necessary predicate to give jurisdiction, and to comply with due process.

The Appellees herein (the Appellants in the court below) in failing to name any Appellate Court to which they took their appeal, in effect, made no appeal, and the hearing of an appeal based on such a null and void Notice of Appeal did not afford due process. It is submitted that under these circumstances, whether due process has been adhered to, is squarely before this court.

Suppose Appellant had filed their present Notice of Appeal with the Supreme Court of Florida to this Court without setting out that the appeal was taken "to the Supreme Court of the United States" this Court would certainly hold the appeal a nullity. Such an omission is and should be fatal.

The dearth of decisions on the precise point shows the rarity of such an omission, but the necessity to name the Appellate Court is **glaringly obvious.**

CONCLUSION

The Circuit Court's Final Decree adjudicated as unconstitutional and void under State and Federal Law Sec. 475.25 (2) F.S.A. Florida Real Estate Brokers' Act and enjoined the carrying out the revocation of Appellant's Real Estate Broker's License by Appellees which revocation order was entered pursuant to the mandatory provisions of said Act requiring revocation **if holder is confined in any State or Federal prison**; this final decree was appealed by Appellees direct to the Florida Supreme Court (bypassing the District Court of Appeal) under constitutional provisions allowing a direct appeal to the Florida highest Appellate Court, where the validity of a State or Federal Statute or construing a controlling provision of Florida or Federal Constitution, was involved; the Supreme Court avoided passing upon the constitutional question which was directly before it; three dissenting Justices affirmatively indicated in the written minority and dissenting opinion that the bare majority opinion of reversal containing a direction for dismissal of the complaint in the lower court upon which the final decree was predicated, avoided the constitutional question.

Substantial Federal Questions are involved. A mandatory provision, in a statute requiring revocation of a license **for mere confinement** clearly violates the constitution of the United States. (See Appellant's Jurisdictional Statement, pages 18 to 21 inclusive).

It is therefore submitted that Appellee's Motion to Dismiss or Affirm is not sufficient for this Court to deny plenary consideration with briefs on the merits and oral argument for the solution of the constitutional questions involved.

To avoid repetitions, we respectfully refer the Court to our jurisdictional statement and decisions cited therein as well as Appendix A and B.

Respectfully submitted,

ROSENHOUSE & ROSENHOUSE
910 Olympia Building
Miami, Florida

By _____
D. L. Rosenhouse

By _____
M. H. Rosenhouse
-AND-
BURTON B. LOEBL
1880 N.E. 170th Street
North Miami Beach, Florida

By _____
Attorneys for Appellant

M. H. ROSENHOUSE of Counsel
for Appellant
910 Olympia Building
Miami, Florida

PROOF OF SERVICE

I, M. H. ROSENHOUSE, of counsel for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of June, 1962, I served four copies of the foregoing Appellant's Brief In Opposition To Appellees' Motion to Dismiss Or Affirm together with the Appendix, by mailing said copies in a duly addressed envelope, with sufficient United States airmail postage prepaid to: Benjamin T. Shuman, General Counsel, Florida Real Estate Commission, State of Florida Office Building, West Morse Boulevard, Winter Park, Florida; and depositing same in a United States post office or mail box at Miami, Florida.

M. H. Rosenhouse
Of Counsel for Appellant

I hereby acknowledge receipt of four copies of the foregoing Jurisdictional Statement on this the ____ day of June, 1962.

BENJAMIN T. SHUMAN,
General Counsel
Florida Real Estate Commission
State of Florida Office Building
West Morse Boulevard
Winter Park, Florida

By _____
BENJAMIN T. SHUMAN

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA — IN CHANCERY NO. 59 C 11355.

MILTON J. HARRIS,

Plaintiff

vs.

THE FLORIDA REAL ESTATE COMMISSION, a Statutory Commission under the Laws of the State of Florida and ROBERT T. BRINKLEY, Chairman, JAMES R. BORING, Vice-Chairman, and SYLVAN M. MAXWELL, Commissioner, As and Constituting the Members of the Said Commission,

Defendants,

NOTICE OF APPEAL

The Defendants, The Florida Real Estate Commission, Robert T. Brinkley, James R. Boring and Sylvan M. Maxwell, take and enter their appeal from the Final Decree entered by the Honorable George E. Holt, in above styled cause, on the 11th day of July, A. D. 1960, recorded in Chancery Order Book 1460, Page 49, public records of Dade County, Florida,

and all parties to said cause are called upon to take notice of the entry of said appeal.

S/ BENJAMIN T. SHUMAN.
Benjamin T. Shuman
Attorney for Defendants
State Office Building
West Morse Boulevard
Winter Park, Florida

I certify that I mailed a copy of the foregoing Notice of Appeal to Julius Jay Perlmutter, Esquire, 407 Lincoln Road, Miami Beach, Florida, Attorney for Plaintiff, by U. S. Mail, this 6th day of September 1960.

S/ BENJAMIN T. SHUMAN
Benjamin T. Shuman

BTS/k e

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT- 31 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 930 — October Term, 1961
No. 100 — October Term, 1962

MILTON J. HARRIS,

Appellant

vs.

THE FLORIDA REAL ESTATE COMMISSION,
A statutory Commission under the Real Estate Laws of the State of Florida,

Appellees.

APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANT'S PETITION FOR REHEARING.

BURTON B. LOEBL
1880 N. E. 170th Street
North Miami Beach, Florida

ROSENHOUSE & ROSENHOUSE
910 Olympia Building
Miami, Florida

D. L. ROSENHOUSE
910 Olympia Building
Miami, Florida
Attorneys for Appellant

M. H. ROSENHOUSE
910 Olympia Building
Miami, Florida
Of Counsel for Appellant

IN THE

Supreme Court of the United States

No. 930 — October Term, 1961

No. 100 — October Term, 1962

MILTON J. HARRIS,

Appellant

vs.

THE FLORIDA REAL ESTATE COMMISSION,
A statutory Commission under the Real Estate Laws
of the State of Florida,

Appellees.

APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANT'S PETITION FOR REHEARING.

The appellant, MILTON J. HARRIS, pursuant to Rule 58 (1) as well as Rule 58 (2) of the Revised Rules of the Supreme Court of the United States, respectfully moves the Court for a rehearing of the Per Curiam decision granting appellees' motion to dismiss the appeal in the above entitled and numbered cause, and treating the papers whereon the appeal was taken as a Petition for Writ of Certiorari, denying certiorari on October 8, 1962. The cause was docketed as #930, October term 1961, and the

Court's decision is numbered 100, so both numbers are set out.)

For his Petition for rehearing appellant states:

1. The writer of this brief, for many, many years has contended that a bare per curiam decision of denial without even a short opinion setting out the reasons and decisions predicating the entering of such order, places *an appealing litigant at a great disadvantage;* that although the rules provide for a petition for rehearing, yet the absence from the decision of the reasons for the court's holding, or upon what rule of law or decision it is based, puts great stumbling blocks in a litigant's path, and adds nothing to the doctrine of stare decisis, nor does it inform an advocate or the bar what has been omitted, if anything.

It is respectfully suggested to this Honorable Court that it is time to re-examine the doctrine of "per curiam decisions", the inadequacy of which many lawyers feel, and although this may be a lone out-cry in the dark, it is hoped that this feeble voice may one day fall upon sympathetic judicial ears, who will hark back to their days of advocacy and the trials connected therewith.

2. The matter involved in this appeal here is not one of a cause celebre; it has no social significance of great importance, nor will the issues here predicate any drastic executive action, but the denial of this petition for rehearing which would be an adherence to the reversal (not on constitutional grounds) by the Florida Supreme Court of the Final Decree by the Circuit Court of Dade County, Florida, which Circuit Court held unconstitutional Section 475.25 (2) of the Florida Statutes providing for manda-

tory revocation by the Real Estate Commission, an administrative body, of a real estate broker's license for *mere confinement* in a *State or Federal* prison, will deprive the appellant, a 61 year old citizen, who has been a real estate broker for 38 years, of his livelihood.

It is respectfully submitted that Sec. 427.25 (2) Florida Statutes is plainly and outstandingly unconstitutional under the organic law of the United States. The statute requirement to an administrative body (the appellees) mandatorially to revoke a real estate broker's license because of being confined in a State or Federal prison will not and cannot apply equally to a person convicted for evasion of income tax, because this mandatory provision applies *only to the sentence* and *judgment given under said conviction*, depending upon whether the sentence and judgment of conviction carries with it a prison term because if it does not the broker's license could not be revoked under the said statute.

In the cause at bar appellees seeking to revoke the appellant's real estate license, was not invoked because he was convicted for income tax evasion, but because he *was confined* in a Federal institution. (appellant was convicted for income tax evasion and sentenced to a 6-month prison term. He was released after 113 days because of the inconsequential nature of the offense.)

To illustrate the unconstitutional features of the section 475.25 (2) Florida Statute:

If after being found guilty of the evasion of income tax, the court had

(a) fined him only, and the fine was paid, the mandatory provisions of revocation statute would not come into play—because Harris was not "confined";

(b) If Harris, the appellant, was fined and took a pauper's oath, he would then only have to serve thirty days—his broker's license, under the mandatory provisions of the statute, would have to be revoked by the Real Estate Commission—because he was "confined".

(c) If the court put him on probation at the time of his sentence, and he avoided confinement after conviction—his broker's license could not be revoked under the mandatory provisions of the attacked statute.

(d) If the court sentenced him to an imprisonment term and suspended the incarceration during good behavior—his broker's license under the mandatory provision for revocation could not be revoked.

If the five steel corporation executives fined a total of $44,000.00 on their nolo contendere pleas to charges of conspiracy to fix prices and rig bids in steel sales in New York by the Honorable United States District Judge, Sylvester J. Ryan, on October 25, 1962, were duly licensed Florida real estate brokers, the mandatory provisions of the Florida Statute for the Real Estate Commission to revoke their licenses would not apply because they had not been confined.

As a further illustration, if General Walker and Governor Barnett were duly licensed real estate brokers in Florida, the Real Estate Commission would mandatorially require the revocation of General Walker's brokerage license because he was confined in a Federal prison, whereas, the mandatory provisions would not apply for Gov. Barnett up to the present time because he has not been confined.

It is respectfully contended therefore, that the Court inadvertently failed to consider that any person who is a real estate broker in Florida, convicted of evasion of income tax would not come under the mandatory provisions of the revocation statute as aforesaid unless one was confined in a state or federal prison. A person fined and who paid the fine, or for one who was found guilty and put on probation, the brokers license would not be revoked under the mandatory provision aforesaid.

3. In this appeal, there was directly involved the question of whether the omission to name any Appellate Court in the Notice of Appeal violated the due process clause. If an appeal is allowed from one Court to another, and it is not necessary to name the Appellate Court in the notice and such an appeal *is due process*, then it is suggested to this Court that once and for all a clarification of this rule of law should be made by an opinion so that it can become a stare decisis enunciation.

Rehearing is respectfully requested and a reversal of this Honorable Court's decision.

ROSENHOUSE & ROSENHOUSE
and
D. L. ROSENHOUSE and
M. H. ROSENHOUSE
910 Olympia Building,
Miami, Florida,
and
BURTON B. LOEBL,
1880 N. E. 170 Street
North Miami Beach, Florida

By _____
Attorneys for Appellant

M. H. ROSENHOUSE
of Counsel for Appellant
910 Olympia Building
Miami, Florida

CERTIFICATE OF GOOD FAITH

I, M. H. ROSENHOUSE, of counsel for the Appellant herein, and a member of the bar of this Court, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay, and I do hereby certify that the said petition is restricted to what I believe to be intervening circumstances of substantial or controlling effect.

PROOF OF SERVICE

I, M. H. ROSENHOUSE, counsel for appellant herein, and a member of the bar of the United States Supreme Court, do hereby certify that on the _____ day of October, 1962, I served four (4) copies of the foregoing appellant's petition for rehearing by mailing said copies in a duly addressed envelope with sufficient air mail postage prepaid to:

Benjamin T. Shuman, Esq.,
General Counsel, Florida Real Estate Commission
State Office Building,
West Morse Boulevard
Winter Park, Florida

and depositing the same in the United States postoffice or mail box in Miami, Florida.